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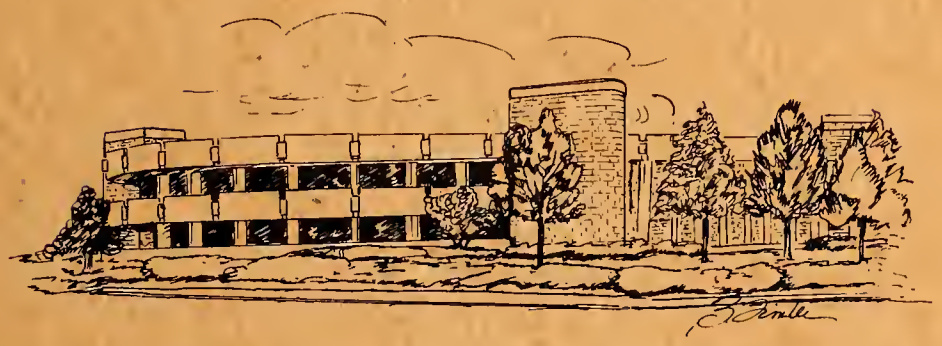

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Indiana Law Review

Volume 14 1981 Number 4

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Article

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Volume 14 Fall 1981 Number 4

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published four times yearly, January, March, April, and June, by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility therefor. Subscription rates: one year, $15.00; foreign $18.50. Single copies: annual Survey issue, $9.00; other issues, $4.50. Back issues, volume 1 through volume 13, are available from Fred B. Rothman & Co., 10368 W. Centennial Rd., Littleton, Co. 80123. Please notify us one month in advance of any change of address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law—Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.

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Page 751, asterisk footnote should read:

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Indiana Law Review

Volume 14 1981 Number 4

Breaking Wills in Indiana

THOMAS J. REED*

I. INTRODUCTION

Will contests are a subtle form of malpractice action in which disappointed relatives attempt to destroy a lawyer's handiwork because the lawyer drew a will for someone who did not meet the test for competency. Probate practitioners are victimized by gnawing fears that some overaggressive trial specialist will sabotage the well-laid testamentary plans of one of his or her solid and sensible clients by persuading a jury that the will was the result of undue influence or duress.

A sufficient number of will contests are filed each year to make the tactics and strategy of waging war on a will important to every practitioner. Disappointed family members may allege that the decedent's will was executed when the testator lacked testamentary capacity, was under undue influence of another, or was induced to make a will through fraudulent representations or duress.[1] Consequently, probate and estate planning specialists and other lawyers who regularly make wills and trusts might well benefit from a consciousness-raising session on the grounds for breaking wills and trusts under Indiana law. In addition, trial practitioners must learn to appraise the probability of success or failure in a will contest early in the client-contact stage of a case so that hopeless cases may be avoided.

This Article will establish that the vast majority of wills attacked in Indiana as the product of an unsound mind, undue influence, fraud, or duress are eventually sustained by appellate courts despite serious mental aberrations of the testators who executed them. This conforms to the American judicial pattern which sustains wills when at the same time simple contracts would be avoided as the product of an unsound mind. This Article will also encourage the careful

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[1]For a detailed analysis of the American law of testamentary capacity *see* Reed, *The Stolen Birthright—An Examination of the Psychology of Testation and an Analysis of the Law of Testamentary Capacity—A Modest Proposal*, 1 W. NEW ENG. L. REV. 429 (1979) [hereinafter cited as *A Modest Proposal*].

practice of preventive law by will drafters in order to minimize the possibility of an expensive, albeit unsuccessful, will contest when faced with the task of making a disinheriting will for a client. In addition, this Article should be helpful to litigators who must bear the substantial burden of proof and presumption problems for contestants in will contests.

This study is based on a survey of 123 Indiana appellate decisions reported since 1854 involving wills contested on the basis of lack of capacity, undue influence, fraud, or duress. Findings from this survey appear throughout this Article in support of assertions made concerning Indiana will contests.

II. Testamentary Capacity in Indiana

Indiana courts have recognized five independent grounds on which a will may be avoided at law: lack of testamentary capacity, undue influence, fraud, duress, and want of due execution.[2] Of these five statutory grounds for avoiding wills, lack of capacity, undue influence, and fraud are the most significant.

The English standard for testamentary capacity originated in two different court systems. The ecclesiastical court system administered those wills, or portions of wills, which attempted to transfer personal property. After 1540, the King's common law courts administered wills, or portions of wills, which devised real estate. The Statute of Wills,[3] passed in 1540, stated that idiots and persons of non-sane memory were precluded from making a will at common law.[4] The Canon Law impediments to a valid testament, the

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[2]Ind. Code § 29-1-7-17 (1976) provides in part:

> Any interested person may contest the validity of any will or resist the probate thereof, at any time within five (5) months after the same has been offered for probate, by filing in the court having jurisdiction of the probate of the decedent's will his allegations in writing verified by affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto.

The statute and its predecessors have been interpreted to include a cause of action for undue influence under the rubric of want of due execution. *See, e.g.*, Barr v. Sumner, 183 Ind. 402, 408, 107 N.E. 675, 677 (1915); Wiley v. Gordon, 181 Ind. 252, 258, 104 N.E. 500, 502 (1914); Clearspring Township v. Blough, 173 Ind. 15, 24-25, 88 N.E. 511, 514 (1909); Willett v. Porter, 42 Ind. 250, 254 (1873); Reed v. Watson, 27 Ind. 443, 445 (1867); Kenworthy v. Williams, 5 Ind. 375, 377 (1854); Kozacik v. Faas, 143 Ind. App. 557, 565, 241 N.E.2d 879, 883 (1968).

[3]The Act of Wills, 1540, 32 Hen. 8, c.1.

[4]The bill concerning the explanation of wills, (1542-43), 34 & 35 Hen. 8, c.5, § 14. This statute provides in part that "wills or testaments made of any manors, lands, tenements, or other hereditaments, by any . . . idiot, or by any person *de non sane* memory, shall not be taken to be good or effectual in the law." *Id.*

most important of which was "defecta mentis sua" (unsound mind), were enforced by the ecclesiastical courts.[5] By the 1780's, English courts had devised a legal test for testamentary capacity. The testator had to be aware at the time of executing the will of those persons who would be intestate successors. The testator also had to be aware of the components of his or her estate and its general value. While keeping these elements in mind, the testator had to be able to make a rational plan for disposing of his or her assets at death by the medium of a will.[6] The first two elements of this formula were forcefully stated in Lord Kenyon's charge to the jury in *Greenwood v. Greenwood.*[7] The "rational plan" element was added by the case of *Harwood v. Baker.*[8] This combined *Greenwood-Baker* Rule was adopted by New York in the early nineteenth century and passed into Indiana case law through the popular treatises on wills brought to the west by the nineteenth century lawyers.[9] The two lines of authority, together with most of the baggage of the common law of property, passed into American law through the colonial courts and went west into the Northwest Territory in the 1780's.

A. The Doctrine of Testamentary Capacity in Indiana

Although some Indiana cases have tried to refine the standard *Greenwood-Baker* formula for determining testamentary capacity, most Indiana decisions restate the New York Court of Appeals' formulation of the doctrine taken from the leading mid-nineteenth century case of *Delafield v. Parrish.*[10]

> [I]t is essential that the testator has sufficient capacity to

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[5]The ecclesiastical impediments to execution of a valid will were: (1) *propter defectum suae potestais* (those who could not make wills, such as a son, a slave, or a monk, because of servile status); (2) *propter defectum mentis* (those who were mentally defective, mentally retarded, madmen, or prodigals); (3) *propter defectum sensualitatis* (those who were blind, deaf, or dumb); (4) *ratione poenalitatis* (criminals in prison); (5) *ratione dubietatis* (those whose legal status was doubtful). For an elaboration of Canon Law impediments to making a will, *see* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (5th ed. 1943).

[6]The first case to construe the provisions of the Statute of Wills relating to idiots and persons of non-sane memory was Pawlet Marquess of Winchester's Case, 77 Eng. Rep. 287 (K.B. 1601). That decision did little to interpret the statute. Later 18th century cases grappled with the appropriate instruction to the jury concerning this provision of the Statute of Wills. *See, e.g.*, Greenwood v. Greenwood, 163 Eng. Rep. 930 (K.B. 1790).

[7]163 Eng. Rep. 930 (K.B. 1790). *Greenwood* is in reality a report of Lord Kenyon's charge to the jury in a will contest, containing the current state of the law of testamentary capacity as evolved in trial courts over several centuries.

[8]13 Eng. Rep. 117 (P.C. 1840).

[9]*See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 202-27 (1973) for a description of this process.

[10]25 N.Y. 9, 9 N.Y.S. 811 (1862).

> comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the case, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the statute of wills, a person of sound mind and memory, and is competent to dispose of his estate by will.[11]

In order to adjudge that a testator had the requisite testamentary capacity when the will was executed, an Indiana court must find

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[11] *Id.* at 29, 9 N.Y.S. at 816. *See also* 2 W. BLACKSTONE, COMMENTARIES* 496-97. Indiana had no appellate decisions which articulated a standard for determining when testamentary capacity had been disproven until Bundy v. McKnight, 48 Ind. 502 (1874). In *Bundy*, jury instructions eight and nine concerning testamentary capacity were challenged on appeal and sustained in pristine form by the Indiana Supreme Court. The instructions read as follows:

> 8. While the law does not undertake to measure a person's intellect, and define the exact quantity of mind and memory which a testator shall possess to authorize him to make a valid will, yet it does require him to possess mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he shall have sufficient active memory to retain all these facts in his mind long enough to have his will prepared and excuted; if he has sufficient mind and memory to do this, the law holds that he has testamentary capacity; and even if this amount of mental capacity is somewhat obscured or clouded, still the will may be sustained.
>
> 9. To enable a person to make a valid will, it is not requisite that he shall be in the full possession of his reasoning powers, and of an unimpaired memory. Few, if any, persons are in the full possession of their reasoning faculties when enfeebled by age or prostrated by disease. A large majority of wills are made when the testator is upon his deathbed, and when the mind and body are more or less affected by disease and suffering; nevertheless, a person prostrated by disease is capable of making a valid will, if at the time of its execution he has mind sufficient to know and understand the business in which he is engaged.

48 Ind. at 511. Indiana cases dealing with testamentary capacity tend to use the *Bundy v. McKnight* formula for stating the elements of testamentary capacity. Ramseyer v. Dennis, 187 Ind. 420, 425-26, 116 N.E. 417, 418 (1917); Barr v. Sumner, 183 Ind. 402, 415, 107 N.E. 675, 679 (1915); Wiley v. Gordon, 181 Ind. 252, 265, 104 N.E. 500, 505 (1914); Pence v. Myers, 180 Ind. 282, 284, 101 N.E. 716, 717 (1913); Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 295, 205 N.E.2d 562, 563-64 (1965); Hinshaw v. Hinshaw, 134 Ind. App. 22, 25, 182 N.E.2d 805, 806 (1962); Powell v. Ellis, 122 Ind. App. 700, 709-10, 105 N.E.2d 348, 352-53 (1952).

that the testator: (1) knew the natural objects of his or her bounty;[12] (2) knew the nature and extent of his or her property (in general, what he or she owned or controlled and its approximate worth at the time the will was drafted);[13] and (3) was able at the time of making and planning the will to keep the two prior factors in mind and make a rational plan for disposing of his or her property after death.[14]

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[12]In Indiana, objects of one's bounty refers to the persons who would take the testator's property according to the laws of descent. This standard for limiting "natural objects of one's bounty" has been articulated in at least two Indiana appellate court cases, Egbert v. Egbert, 90 Ind. App. 1, 5, 168 N.E. 34, 35-36 (1929) and Jewett v. Farlow, 88 Ind. App. 301, 303-04, 157 N.E. 458, 459 (1928). In an earlier case, Bradley v. Onstott, 180 Ind. 687, 694, 103 N.E. 798, 800 (1914), the Indiana Supreme Court held that the jury may consider whether or not the proposed will disinherited the testator's children or their descendants, a natural object of bounty, which the law recognizes as natural objects of the testator's bounty. However, in Barricklow v. Stewart, 163 Ind. 438, 440, 72 N.E. 128, 129 (1904) the supreme court stated that the testator's mistaken impression that an individual would take an intestate share in his estate was not admissible on the issue of the testator's want of capacity. Indiana probably follows the majority of states in tying its notion of "natural objects of bounty" to intestate successors or persons possessing forced share rights in the testator's estate. *See A Modest Proposal*, *supra* note 1, at 456-57 for a discussion of this phenomenon in greater detail.

[13]Indiana probably has adopted the rule that the ability to recall the nature and extent of one's property is determined more or less by the actual size of the testator's holdings at the time the will is made. Jewett v. Farlow, 88 Ind. App. 301, 306-07, 157 N.E. 458, 459-60 (1928). Indiana has also adopted the position of a majority of states, that one may not actually be required to recall all of his or her property when executing his will. The law demands that the testator simply be *able* to do so. *Id.* at 307, 157 N.E. at 460. In Barricklow v. Stewart, 163 Ind. 438, 72 N.E. 128 (1904) the Indiana Supreme Court held that it was not error to exclude the inventory and appraisal of the testator's estate as evidence of the nature and extent of his property at death. *Id.* at 441, 72 N.E. at 129.

[14]The "rational plan" portion of the *Greenwood-Baker* rule in Indiana jurisprudence has been subdivided by the appellate courts into two types of verbal formulae. Most cases follow instruction eight in *Bundy v. McKnight*, which states that:

> [H]e shall have sufficient active memory to retain all these facts [natural objects of bounty and nature and extent of his property] in his mind long enough to have his will prepared and executed; if he has sufficient mind and memory to do this, the law holds that he has testamentary capacity . . . .

Bundy v. McKnight, 48 Ind. at 511. This model was approved by the court in Ramseyer v. Dennis, 187 Ind. 420, 426, 116 N.E. 417, 418 (1917); Wiley v. Gordon, 181 Ind. 252, 265, 104 N.E. 500, 505 (1914); and Pence v. Myers, 180 Ind. 282, 284, 101 N.E. 716, 717 (1913). It is essentially the same model as that adopted by the New York Court of Appeals in *Delafield v. Parish*.

The variations on this theme include a significant number of cases which add language from instruction nine approved in *Bundy v. McKnight*: "[A] person . . . is capable of making a valid will, if at the time of its execution he had mind sufficient to know and understand the business in which he is engaged." 48 Ind. at 511. This clause is added to the basic descriptive language cited above in Blough v. Parry, 144 Ind. 463, 467-71, 40 N.E. 70, 71-73 (1895); Dyer v. Dyer, 87 Ind. 13, 18 (1882); and in Lowder v.

In uncontested proceedings for probate, the proponent of a will, by reason of the statutory provisions of Indiana Code sections 29-1-7-20[15] and 29-1-5-1[16] and the implied presumption of capacity arising from due execution,[17] carries the burden of proof on testamentary capacity by showing that the will was duly executed according to the provisions of Indiana Code sections 29-1-5-2[18] and

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Lowder, 58 Ind. 538, 542 (1877). Instruction nine in *Bundy v. McKnight* incorporated a standard applied to the test for appointing a guardian for someone. The instruction, in the context of the case, described the mental capacity of a very sick person. The instruction was incorporated to explain to the jury what effect the terminal illness of the testator had on the execution of his will. Other variations on this verbal formula appear in Ditton v. Hart, 175 Ind. 181, 186, 93 N.E. 961, 964 (1911) and in Whiteman v. Whiteman, 152 Ind. 263, 274-75, 53 N.E. 225, 229-30 (1899).

Modern Indiana Court of Appeals decisions on testamentary capacity restate the language used in *Bundy v. McKnight* as the general formula for testamentary capacity in Indiana. *See* Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 295, 205 N.E.2d 562, 563-64 (1965); Hinshaw v. Hinshaw, 134 Ind. App. 22, 25, 182 N.E.2d 805, 806-07 (1962); Noyer v. Ecker, 125 Ind. App. 700, 709-10, 105 N.E.2d 348, 352 (1952). In essence, Indiana's courts believe that a testator must be able to make a rational plan for disposition of his or her property at the time of executing the will.

[15]IND. CODE § 29-1-7-20 (1976) reads in part as follows: "In any suit to resist the probate, or to test the validity of any will after probate, as provided in section 717 [IND. CODE § 29-1-7-17] of this [probate] code, the burden of proof shall be upon the contestor." This 1953 statute erased the learning built upon more than twenty appellate decisions in Indiana on the right to open and close in a will contest and the duty of the proponent to make a prima facie case on capacity and freedom from undue influence. *See, e.g.*, Van Meter v. Ritenour, 193 Ind. 615, 618, 141 N.E. 329, 329-30 (1923) (burden of proof on contestant when will is admitted to probate); Johnson v. Samuels, 186 Ind. 56, 61-62, 114 N.E. 977, 979 (1917) (proponent may open and close when contestant files objections to will prior to probate since proponent has burden of proof); Herring v. Watson, 182 Ind. 374, 377, 105 N.E. 900, 901 (1914) (burden of proof on issue of capacity on proponent in pre-probate will contest).

[16]IND. CODE § 29-1-5-1 (1976) provides in part: "Any person of sound mind who is eighteen (18) years of age or older, or who is younger and a member of the armed forces, or of the merchant marine of the United States, or its allies, may make a will."

[17]In Indiana the proponent enjoys a presumption of capacity and of freedom from undue influence, fraud, and coercion on proof of the due execution of the testator's will. McCord v. Strader, 227 Ind. 389, 392, 86 N.E.2d 441, 442 (1949); Kaiser v. Happel, 219 Ind. 28, 30-31, 36 N.E.2d 784, 786 (1941); Herbert v. Berrier, 81 Ind. 1, 4-6 (1881).

[18]IND. CODE § 29-1-5-2 (1976) provides in part:

> (a) All wills except nuncupative wills shall be executed in writing.
>
> (b) Any person competent at the time of attestation to be a witness generally in this state may act as an attesting witness to the execution of a will and his subsequent incompetency shall not prevent the probate thereof.
>
> (c) If any person shall be a subscribing witness to the execution of any will in which any interest is passed to him, and such will cannot be proved without his testimony or proof of his signature thereto as a witness, such will shall be void only as to him and persons claiming under him, and he shall be compelled to testify respecting the execution of such will as if no such interest had been passed to him; but if he would have been entitled to a distributive share of the testator's estate except for such will, then so much

29-1-5-3.[19] When a will contest is filed under Indiana Code section 29-1-7-20, the statute lays the burden of disproving testamentary capacity on the contesting party.[20] It follows that the contestant has the right to open and close in will contests[21] and the proponent of a will is obliged to do nothing more than submit his will for proof under the forms of the Probate Code.[22] Upon proof of execution by one of the means provided for in Indiana Code section 29-1-7-13, the proponent has created a triable issue of fact and has carried whatever burden of going forward with evidence of capacity and freedom from influence, fraud, or duress is imposed by Indiana law. If a contestant successfully disproves any of the three elements of capacity,[23] the court must hold the will invalid.

1. Testators Under Guardianship. — According to Indiana law, a person may be put under guardianship if he or she is "incompetent."[24] "Incompetent" is defined by the Probate Code as "a person who is . . . incapable by reason of insanity, mental illness, mental retardation, senility, habitual drunkenness, excessive use of drugs, old age,

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of said estate as said witness would have been thus entitled to, not exceeding the value of such interest passed to him by such will, shall be saved to him.

(d) No attesting witness is interested unless the will gives to him some personal and beneficial interest. The fact that a person is named in the will as executor, trustee, or guardian, or as counsel for the estate, personal representative, trustee or guardian does not make him an interested person.

[19]IND. CODE § 29-1-5-3(a) (Supp. 1980) provides in part:

The execution of a will, other than a nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:

(1) The testator, in the presence of two (2) or more attesting witnesses, shall signify to them that the instrument is his will and either:

(i) sign the will;

(ii) acknowledge his signature already made; or

(iii) at his direction and in his presence have someone else sign his name for him; and

(2) The attesting witnesses must sign in the presence of the testator and each other.

[20]IND. CODE § 29-1-7-20 (1976).

[21]The right to open and close, which follows from assignment of a statutory burden of proof on lack of capacity, undue influence, fraud, duress, and want of execution is significant in terms of the tactical position of the contestant. The contestant has the final argument to the jury and the chance to rebut the proponent's case. If this statute is applied rigorously, only the due execution of the will need be established by the proponent.

[22]For the procedure involved, *see* IND. CODE §§ 29-1-7-2 to -5, -13 (1976). With the advent of a self-proving will form in 1975, Indiana lawyers may open an estate and submit an application for letters testamentary by filling out the required form for application for letters and by attaching the original will and the affidavit required by IND. CODE § 29-1-5-3(b) (1976).

[23]For a statistical breakdown of Indiana testamentary capacity cases, *see* appendices available from the publisher.

[24]IND. CODE § 29-1-18-6 (1976).

infirmity, or other incapacity, of either managing his property or caring for himself or both."[25] An adjudication of incompetency could be res judicata on the issue of capacity to execute a will, but Indiana case law consistently refused to recognize the relationship between an adjudication of incompetency and capacity to make a will. *Pepper v. Martin*[26] is a typical case. The testator was quite elderly. He exhibited many signs of senile psychosis and, pursuant to statute, was put under guardianship.[27] Nonetheless, the Indiana Supreme Court reversed the trial court's verdict for the contestant and admitted the testator's will to probate despite the fact that the will was made *after* the guardianship order became final. The grounds for reversal cited by the supreme court were errors in instructions.[28] The court stated that proof that the testator had been under guardianship at the time he made his will was a "prima facie case" of lack of capacity, but not conclusive on that issue.[29] The court stated that the contestant retained the burden of proof on the issue of want of capacity. Therefore, once the proponent offered some evidence to rebut the adjudication of incompetency in the guardianship proceeding, the contestant had to produce *more evidence* of want of testamentary capacity if the contestant was to prevail. The court impliedly treated the presumption of continuing incompetency or insanity as a presumption that disappeared when contrary evidence, however slight or incredible, appeared to oppose it.

When a court finds a person incompetent, it decrees that the person is incapable of making an ordinary contract.[30] The predominant view in the United States is that persons under guardianship may generally make a will although they are protected by the court from making an inter vivos gift of the same property.[31] This dual standard cannot be rationally defended.

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[25]IND. CODE § 29-1-18-1 (1976 & Supp. 1980).

[26]175 Ind. 580, 92 N.E. 777 (1910).

[27]*Id.* at 584, 92 N.E. at 778.

[28]*Id.* at 582-83, 92 N.E. at 778.

[29]*Id.* at 583, 92 N.E. at 778.

[30]This result has long been reached by statute. The present Indiana Code section 29-1-18-41 (1976) summarizes the result of much appellate litigation: "Every contract, sale or conveyance had or executed by any one previously adjudged to be an incompetent and while under such legal incompetency shall be void unless such incompetency is due solely to such person's minority, in which case such contract, sale or conveyance shall be only voidable."

[31]*See, e.g.*, Teegarden v. Lewis, 145 Ind. 98, 100-01, 40 N.E. 1047, 1048 (1895). *Teegarden*, however, held that the capacity to make an inter vivos gift is no greater than that needed to make a will. *Id.* The Indiana Supreme Court reaffirmed this position in Thorne v. Cosand, 160 Ind. 566, 569, 67 N.E. 257, 258 (1903), but the appellate court adopted a different test in Deckard v. Kleindorfer, 108 Ind. App. 485, 491, 29 N.E.2d 997, 999 (1940), holding that to make a valid inter vivos gift a party had to have

2. Alcoholic Testators.—Only one Indiana appellate decision examined the post-death plans of a testator under the influence of narcotics.[32] However, Indiana case law contains at least eight cases of alcoholic testators on appeal. Alcoholic testators generally received gentle treatment at the hands of Indiana appellate courts. In *Derry v. Hall*,[33] the appellate court reversed a trial court verdict and judgment for the contestant.[34] Oria Dolan, the testator, died of nephritis and pneumonia in Indianapolis in 1926 at approximately the age of 53.[35] Mr. Dolan was unmarried and his closest relatives were some cousins, aunts, and uncles with whom he had very little to do during the last twenty years of his life.[36] His will, made at the hospital the day before his death, left the balance of his estate to several Roman Catholic charities.[37] The evidence disclosed that Dolan had been addicted to alcohol and that Dolan exhibited some of the signs of alcoholic brain disease.[38] The jury set aside Dolan's will as the product of an unsound mind but the appellate court reversed the trial court on the ground that the verdict was not supported by the

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"sufficient mind and memory to comprehend the nature and extent of his act and to understand the nature of the business in which he is engaged and to exercise his own will with reference thereto."

[32]Haas v. Haas, 121 Ind. App. 335, 96 N.E.2d 116 (1951).

[33]96 Ind. App. 683, 175 N.E. 141 (1931). *But see* Swygart v. Willard, 166 Ind. 25, 76 N.E. 755 (1906) (case decided for the contestant with strong evidence of mental impairment).

[34]96 Ind. App. at 696, 175 N.E. at 145.

[35]*Id.* at 687, 175 N.E. at 142.

[36]*Id.* at 686, 175 N.E. at 142. The principal lay witness for the contestant was Jessie M. Kinney, a cousin from Muncie, who recited a fantastic tale. The testator had gone with her to the Chicago World's Fair in 1892. He locked her in a hotel room when Dolan (known as Dooley to his friends, and indeed, he signed the will under the name of Dooley) was in an alcoholic frenzy. He threatened her with physical abuse and starved her for several days before letting her go. *Id.* at 689, 175 N.E. at 143. Kinney had not seen Dooley since 1921, however, and her evidence, relevant to Dooley's mental impairment from excessive alcoholism in 1892, really did not provide the contestant with a lay witness who would say Dooley was without sound mind on the day of making his will. *Id.* at 693, 175 N.E. at 144.

[37]*Id.* at 688, 175 N.E. at 143.

[38]*Id.* at 690-91, 175 N.E. at 144. The medical evidence of serious pathology was very strong, probably the strongest evidence in favor of setting aside Dolan's will. The death certificate showed Dolan had died of acute lobar pneumonia, a complication of chronic nephritis. Dr. Albert Sterne, an alienist from Indiana University Medical School, testified that the decedent's condition was clearly the result of chronic, long term, excessive use of alcohol, and that such prolonged use of alcohol in excessive quantities would impair all the mental functions of the deceased, even when he was not drinking. *Id.* The appellate court discounted the medical testimony in this case against the testimony of twenty lay persons who were of the opinion that Dolan was of sound mind when he was last seen by each of them. *Id.* at 693, 175 N.E. at 144. This discounting effect is often encountered when lawyers review medical expert opinions in will contests.

evidence, since there was a lack of any testimony showing that the testator was of unsound mind.[39]

Yet, the evidence established Dolan's excessive drinking habits and showed that his death was caused by a complication of a chronic disease associated with acute alcoholism. Thus, the appellate court stretched judicial reasoning to favor the probate of Dolan's will without revealing its reasons for doing so.[40]

3. Senile Testators.—"Senility" is a lay term which usually describes one of two conditions: arteriosclerotic brain disease—a condition produced by insufficient blood supply to the brain caused by fatty deposits in arteries over a long period of time, and so-called senile psychosis—a non-organic mental condition which is clinically observed in people who are extremely old.[41] Contemporary medical opinion has recently been altered by studies which tend to show that some cases of "senile psychosis" may simply be the by-product of inadequate medical treatment for elderly persons who are confused disoriented, forgetful, or hallucinatory due to improper medical care or neglect.[42] The *Greenwood-Baker* Rule was derived from a judicial policy statement concerning the senile testator. It was intended to be a measure of the lowest threshold mental capacity for responsible activity in the understanding and execution of a will. It may be questioned whether the *Greenwood-Baker* Rule provides an adequate distinction between the wills of competent and of incompetent elderly testators who exhibit signs of senility. The majority of Indiana decisions in which the testator's mental state was described

[39]*Id.* at 693-94, 175 N.E. at 144-45. The testator's physician had earlier testified that lobar pneumonia usually causes swelling of brain tissue resulting in impairment of mental faculties. In response to the hypothetical, including the usual swelling associated with pneumonia, Dr. Sterne opined that the hypothetical testator lacked testamentary capacity. The court held this was of no probative value because the facts used in the hypothetical were not established by the evidence. *Id.* at 144, 175 N.E. at 144.

[40]The court seemed to be saying that the doctor could not conclude the decedent had impaired mental functions when he made his will because the physician assumed the decedent died within 24 hours after becoming infected. This fact had not been proved of record by an independent source, although it could clearly have been proven by the hospital records.

[41]*See A Modest Proposal, supra* note 1, at 473-75 for an explanation of the distinction between arteriosclerotic brain disease, which is not necessarily connected with the process of aging, and senile psychosis, a diagnosis used to classify elderly patients with symptoms similar to that of arteriosclerotic brain disease without the organic etiology of elevated blood pressure and periods of dizziness and blackouts and signs of arteriosclerotic changes in the large blood vessels in the neck characteristic of persons whose brains are not receiving an adequate blood supply due to fatty deposits in the smaller arteries in the cranium.

[42]*See, e.g.*, Douglass & Douglass, *Decrepitude Preventions*, 300 J. NEW ENG. MED. 992 (1979); Schwartz, *The Spectre of Decrepitude*, 229 J. NEW ENG. MED. 1248 (1978).

were those involving senile testators. Indiana's cases include two groups of senile testators: "childish" testators and "recluses." A representative sampling of each type of senile testator illustrates the problems encountered with the *Greenwood-Baker* Rule in practice.

An example of a "childish" testator is found in *Love v. Harris*,[43] in which the appellate court affirmed a trial court verdict and judgment for the contestant. William L. Cranston, an elderly bachelor, lived alone on a farm which had originally been co-owned by Cranston, his brother, and his sister.[44] Cranston was the sole survivor and had clear title to the farm. He was very dirty and unshaven, and maintained his home in an incredibly filthy condition.[45] Lay witnesses described Cranston as childlike, stupid and rambling in conversation, unable to recognize acquaintances or relatives, and unable to remember when his tenant farmers had paid him rent.[46] Cranston, approximately four months after making a disinheriting will, was placed under guardianship.[47] The case went to the jury on the dual grounds of lack of capacity and undue influence exerted by Mr. and Mrs. Love, the neighbors who benefited from the 1950 will at the expense of Cranston's nieces.[48]

In *Love*, the testator showed significant signs of physical and mental debility. He was very old at the time his will was made. He exhibited a tendency to forget and was described as childish by lay witnesses. Indiana courts seem ready to accept jury verdicts in cases similar to *Love* which set aside a will as the product of an unsound mind.

Indiana will contests have also involved an inordinate number of recluses. In *Cahill v. Cliver*,[49] the testator, Jessica Sage, was a typical agoraphobe.[50] She was a delicate person who supported herself by tutoring children in her home. In 1906, Jessica, age 35, married William E. McLean, a 74 year old gentleman. Mr. McLean died within a few days after the wedding, leaving Jessica Sage

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[43]127 Ind. App. 505, 143 N.E.2d 450 (1957). For another strong case for the contestant, *see* Bell v. Bell, 108 Ind. App. 436, 29 N.E.2d 358 (1940).

[44]*Id.* at 508-09, 143 N.E.2d at 452.

[45]*Id.* at 509, 143 N.E.2d at 453.

[46]*Id.*

[47]*Id.* at 510, 143 N.E.2d at 453.

[48]*Id.* at 508, 143 N.E.2d at 452. The neighbors also procured the lawyer who made the will, "talked for" Cranston during the will-making process, and, in general, dominated the testator. For a later case involving a recluse with character traits similar to those of W. Cranston, *see* Zawacki v. Drake, 149 Ind. App. 270, 271 N.E.2d 511 (1971).

[49]122 Ind. App. 75, 98 N.E.2d 388 (1951).

[50]The term "agoraphobia" means fear of being in large open spaces. 1 J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER, A-107 (1980).

$250,000. Jessica's father, mother, and brother all died within a few years of one another. Miss Sage suffered a nervous breakdown after the death of her family members and retired within the four walls of the unpainted Sage home in Terre Haute, avoiding all contact with other humans and with the outside world.[51] In addition Miss Sage locked her cleaning woman in the parlour and prevented her from going freely from room to room without Miss Sage's presence.[52]

Jessica Sage's will left the balance of her estate to her lawyer as trustee for the purpose of establishing a home for elderly men in Terre Haute as a memorial for her dead husband, Colonel McLean.[53] The trust instrument, though, varied greatly from the instructions dictated by Sage. It was alleged that she did not know of the changes when she signed the will. The trust instrument gave the trustee unlimited discretion to sell the assets to anyone, including himself, and allowed him to name his own successor trustee.[54] The beneficiaries were described as "worthy poor men," a description which could include anyone whom the trustee chose to designate as worthy and poor, such as friends of the trustee. The appellate court affirmed the trial court's verdict and judgment for the contestant.[55] The court treated the case as one in which an attorney had engaged in overreaching and unethical conduct in order to procure a sinecure from an elderly client.[56]

The recluse syndrome, agoraphobia, is a condition which is not well understood by contemporary medicine. The exaggerated fear of other humans and of open space may have little to do with the legal test for testamentary capacity. It is equally unclear whether agoraphobia is related to any form of senile disorder. Agoraphobic persons may know and recognize the natural objects of their bounty, the nature and extent of their property, and be capable of keeping the two in mind long enough to make a plan for post-death disposition.

4. Organically Impaired Testators.—Indiana will contests include decisions in which the contestant complained that the testator lacked testamentary capacity because the testator made his will on his deathbed while under the influence of debilitating physical illness.[57] Some of the older cases of this genre deal with a testator whose capacity was allegedly impaired by the great pain and agony

[51]122 Ind. App. at 77, 98 N.E.2d at 389.

[52]*Id.* at 78, 98 N.E.2d at 389.

[53]*Id.* at 80, 98 N.E.2d at 389-90.

[54]*Id.* at 80-81, 98 N.E.2d at 390.

[55]*Id.* at 81, 98 N.E.2d at 390.

[56]*Id.* at 76, 98 N.E.2d at 388.

[57]*See, e.g.*, Vance v. Grow, 206 Ind. 614, 190 N.E. 747 (1934); Oilar v. Oilar, 188 Ind. 125, 120 N.E. 705 (1918); Boland v. Claudel, 181 Ind. 295, 104 N.E. 577 (1914); Ludwick v. Banet, 125 Ind. App. 465, 124 N.E.2d 214 (1955); Griffith v. Thrall, 109 Ind. App. 141, 29 N.E.2d 345 (1940).

of a last illness such as cancer,[58] a spinal lesion,[59] or uremic poisoning.[60] Another group of older cases allege that the testator lacked testamentary capacity because the testator made his or her will while under the influence of high fever or a chronic, fatal infection such as pneumonia or tuberculosis.[61] A third group of more modern cases involves allegations that the testator lacked capacity because of brain damage due to stroke or other brain trauma.[62] None of the Indiana decisions dealing with organically impaired testators involved such organic psychoses as syphilis dementia (paresis), psychosis resulting from seizure disorders such as psycho-motor epilepsy, or psychosis from traumatic brain damage.[63] The appellate courts were apparently unimpressed by recitations of the deceased's agony and suffering by lay witnesses, and by the impact that extreme pain, high fever, or other impedimentia had on the testator's mental capacity.

Boland v. Claudel[64] illustrates the fate of organically impaired testators in Indiana. Peter Claudel was a bachelor who lived alone on his farm. In June 1910, Claudel became ill and his kidneys failed him. He was taken in by a neighbor, Edward C. James, who looked after him. Claudel sank into a stupor from uremic poisoning. On June 10, 1910, with the scrivener guiding his hand, Claudel executed a will in Mr. James' home. Medical witnesses called by the contestant concluded that a person in such an advanced stage of kidney failure as Claudel could not have been mentally competent.[65] The Indiana Supreme Court affirmed a jury verdict and judgment for the contestant, giving due recognition to a well-constructed case which showed that the testator's mental condition had been severely impaired by organic illness.[66]

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[58]Vance v. Grow, 206 Ind. 614, 617, 190 N.E. 747, 748 (1934) (testator with terminal cancer made death bed gifts); Rarick v. Ulmer, 144 Ind. 25, 28, 42 N.E. 1099, 1100 (1896) (facial cancer).

[59]Ditton v. Hart, 175 Ind. 181, 93 N.E. 961 (1911).

[60]Boland v. Claudel, 181 Ind. 295, 104 N.E. 577 (1914).

[61]*See, e.g.*, Terry v. Davenport, 170 Ind. 74, 83 N.E. 636 (1908) (high fever during last illness); Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433 (1883) (will made during last illness); Dyer v. Dyer, 87 Ind. 13 (1882) (testator signed will when extremely weak from pneumonia).

[62]*See, e.g.*, Taylor v. Taylor, 174 Ind. 670, 93 N.E. 9 (1910) (will made after testatrix had suffered a severe stroke); Potter v. Emery, 107 Ind. App. 628, 26 N.E.2d 554 (1940) (testator had rheumatism, arteriosclerosis, and Bright's Disease (a form of chronic kidney disease)).

[63]For a more detailed discussion of epileptic testators, *see A Modest Proposal*, *supra* note 1, at 472.

[64]181 Ind. 295, 104 N.E. 577 (1914).

[65]*Id.* at 298, 104 N.E. at 578. For a discussion of the science of toxicology and many of the side effects of commonly used hypertensive medications and pain killers, *see* 4 G. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE chs. 131-32 (3d. ed. E. Berger 1969).

[66]181 Ind. at 298, 104 N.E. at 578.

The *Greenwood-Baker* Rule actually fails to cope with the problem of the organically impaired testator. A person experiencing extreme pain, hallucinating during high fever, or suffering the impact of a seizure may be able to meet the *Greenwood-Baker* Rule yet be unable to orient himself or herself with respect to space, time, and person. At the same time, such organically impaired individuals do not meet the criteria for the "insane delusion" rule. Thus, unless the court is willing to inquire into the effect of pain, fever, or seizure on behavior and to develop a legal explanation for avoiding a will made by someone who was in great pain or delirious, it is highly probable that a will made by a testator who was unable to comprehend the nature of his or her acts will be sustained.

B. Insane Delusion

Indiana case law has recognized that a testator who meets the *Greenwood-Baker* test for testamentary capacity may, nonetheless, lack testamentary capacity if his or her will is the product of an insane delusion or monomania.[67] This rule grew out of the English case of *Dew v. Clark*[68] in which the will of a physician was set aside due to a finding that the will was the product of an "insane delusion" that his blameless daughter was guilty of irregular sexual conduct. This rule, which was generated from eighteenth century psychology, in particular the writings of Jeremy Bentham,[69] was introduced as a means of invalidating a will made as a result of "partial insanity."[70] The type of delusion which can result in the invalidation of a will is a delusion about an object of one's bounty which leads the testator to exclude that person from the will.

The test for the presence of an insane delusion has been variously formulated in Anglo-American case law. In *Barr v. Summer*,[71] it was stated that: " 'An insane delusion exists when a person imagines that a certain state of facts exists which has no existence at all, except in the imagination of the party, and which false impression cannot be removed . . . by any amount of reasoning and argument.' "[72] Insane delusions are frequently confused with strange or absurd

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[67]Thompson v. Hawks, 14 F. 902, 903 (C.C.D. Ind. 1883) (applying Indiana law); Robbins v. Fugit, 189 Ind. 165, 167, 126 N.E. 321, 321-22 (1920); Ramseyer v. Dennis, 187 Ind. 420, 426-27, 116 N.E. 417, 418 (1917); Barr v. Sumner, 183 Ind. 402, 415-16, 107 N.E. 675, 680 (1915); Wiley v. Gordon, 181 Ind. 252, 265, 104 N.E. 500, 505 (1914).

[68]162 Eng. Rep. 410 (Prerog. 1826).

[69]*See A Modest Proposal*, *supra* note 1, at 487-89 for an extended discussion of *Dew v. Clark* and its impact on American will contests.

[70]*Id.*

[71]183 Ind. 402, 107 N.E. 675 (1915).

[72]*Id.* at 418, 107 N.E. at 680 (quoting Bundy v. McKnight, 48 Ind. 502, 512 (1874)).

opinions held by people.[73] Unless delusional thought involves some natural object of one's bounty and is related to the relative merit of leaving property to that individual, it is not an "insane delusion." Indiana's insane delusion cases may be classified into three subgroups:

(1) "They're Out to Get Me" cases in which the testator believes that someone in his family is out to do him or her harm;

(2) "Crank" cases, in which the testator holds eccentric, bizarre or strange religious, scientific or political views, which are improperly treated as insane delusions; and

(3) "Unknown" cases in which the trial court gave an insane delusion instruction without revealing enough of the evidence in the case to suggest the basis for the instruction.

Six of the fifteen will contests involving insane delusions were originally trial verdicts for the proponent and nine were originally decided for the contestant. On appeal, the results were exactly reversed with nine cases being finally determined in favor of the proponent and six for the contestant.[74] Only one case, *Barnes v. Bosstick*,[75] involved a testator committed to a mental institution. In that decision, the proponent offered to prove a lost will over objections that Emma A. Dudley, the testatrix, had revoked the lost will by destruction. The lost will which disinherited her relatives in favor of people outside of her family was executed shortly before Mrs. Dudley was committed to a state mental hospital. The evidence showed that Mrs. Dudley had her 1927 will in her possession when she was committed. The Indiana Supreme Court correctly held that if she destroyed the will while she was insane it was not revoked.[76]

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[73]This is evident most clearly in the "spiritualist" cases in which the testator is alleged to have made a will after consulting the spirits of the dead through a medium. In one such case, the medium appears to have instructed the testator to leave his property to the medium. The verdict for the contestant was sustained on a motion for new trial. Thompson v. Hawks, 14 F. 902, 903-04 (C.C.D. Ind. 1883). *See also* Barr v. Sumner, 183 Ind. 402, 417-20, 107 N.E. 675, 680-81 (1915); Wait v. Westfall, 161 Ind. 648, 665-66, 68 N.E. 271, 277 (1903).

[74]*See* Table Fifty in Appendix A to this Article held by the publisher. *See also* Barnes v. Bosstick, 203 Ind. 299, 179 N.E. 777 (1932) (testatrix committed to insane asylum shortly after making will); Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917) (some symptoms of involutional psychosis); Whiteman v. Whiteman, 152 Ind. 263, 53 N.E. 225 (1899) (unspecified mental aberrations); Forbing v. Weber, 99 Ind. 588 (1885) (revocation case: testator tore up will in fit of "temporary insanity"); Kessinger v. Kessinger, 37 Ind. 341 (1871) (psychotic behavior, allegedly caused by "dropsy"); Rush v. Megee, 36 Ind. 69 (1871) (testator alleged to have been insane when will made); Addington v. Wilson, 5 Ind. 137 (1854) (testator believed his wife to be a witch); Cahill v. Cliver, 122 Ind. App. 75, 98 N.E.2d 388 (1951) (recluse).

[75]203 Ind. 299, 179 N.E. 777 (1932).

[76]*Id.* at 302, 179 N.E. at 778.

The trial court found for the contestants on obscure grounds.[77] The cause was remanded by the supreme court for proof and probate of the copy of the 1927 will in the custody of Mrs. Dudley's lawyer.[78] Although an insane delusion instruction was given in the case, the supreme court did not report the nature of Mrs. Dudley's mental problems.

1. They're Out to Get Me Cases.—In *Burkhart v. Gladish*[79] a testator suffered from delusions which arose from his long-standing alcoholism.[80] Peter Burkhart made a will leaving his estate to four of his nine children.[81] Burkhart harbored an irrational conviction that his wife had been guilty of acts of sexual intercourse with some of his sons-in-law. Burkhart's will disinherited the sons-in-law. Two years after making the will, Burkhart shot himself after first killing his wife.[82] The trial evidence showed that Mrs. Burkhart had no sexual relations with her sons-in-law.[83] Lay opinion witnesses swore that Burkhart was crazed by prolonged excessive drinking.[84] The trial court entered judgment on a jury verdict for the contestant and the judgment was affirmed on appeal by the Indiana Supreme Court.[85] This case is typical of the "insane delusion" cases in which contestants generally prevail. Only one other Indiana case presented a similar profile indicating that the testator had what were once called "delusions of persecution" about a natural object of bounty.[86]

2. Crank Cases.—Indiana appellate courts have been unkind to testators who held unusual cultural or religious beliefs. For exam-

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[77]*Id.* at 300, 179 N.E. at 777.

[78]*Id.* at 303, 179 N.E. at 778.

[79]123 Ind. 337, 24 N.E. 118 (1890).

[80]*Id.* at 344, 24 N.E. at 120.

[81]*Id.* at 339, 24 N.E. at 118.

[82]*Id.* at 344, 24 N.E. at 120. The proponent alleged it was error to permit one of the sons-in-law, Elijah Gladish, to testify that he had never had intercourse with Burkhart's wife. The trial court admitted the testimony, and the supreme court held it was not error, since the testimony was relevant to the issue of whether or not Burkhart had a rational foundation for believing his wife to be unfaithful with his son-in-law. *Id.* at 346, 24 N.E. at 120-21.

[83]*Id.* at 344, 24 N.E. at 120. The proponent tried to exclude under the Dead Man Act the testimony of the disinherited Burkhart children concerning acts and conduct of their dead father prior to the making of his will. *Id.* at 345, 24 N.E. at 120. The supreme court reaffirmed its position announced in Lamb v. Lamb, 105 Ind. 456, 5 N.E. 171 (1886) that the Dead Man Act did not make intestate successors incompetent witnesses on the issue of soundness of mind in a will contest even when they claimed adversely to the will. 123 Ind. at 346, 24 N.E. at 120.

[84]123 Ind. at 345, 24 N.E. at 120.

[85]*Id.* at 347, 24 N.E. at 121.

[86]Friedersdorf v. Lacy, 173 Ind. 429, 90 N.E. 766 (1910). The case was originally decided in favor of the contestant. On appeal, the supreme court reversed the decision on the determination that the trial court had given improper instructions.

ple, only one of four will contests involving the will of a Spiritualist was eventually decided for the proponent during the heyday of that sect.[87] The Spiritualist cases usually presented two alternative grounds for avoiding the testator's will: (1) the testator had an insane delusion because he or she believed in consulting the dead before making a will, and (2) the medium whom the Spiritualist consulted exercised undue influence over the testator. The case of the overreaching medium will be discussed in the next section of this Article dealing with undue influence. The Spiritualist who believed that the dead could tell him or her how to make a post-death plan for distribution of assets caused Indiana courts a great deal of difficulty earlier in this century. In *Steinkuehler v. Wempner*,[88] Wilhelmina Albertsmeyer, the testatrix, made a will in April, 1902 and a codicil in December, 1903, which partially disinherited some of her grandchildren.[89] Mrs. Albertsmeyer, an elderly believer in spiritualism, consulted a medium before making her will. The voice of her dead husband allegedly appeared to her through the agency of the medium and stated that the grandchildren were going to cause her trouble; thus, she decided that their legacy should be a dollar each.[90] The disaffected grandchildren brought an action to set aside her will on grounds of lack of capacity, undue influence (by the dead husband), fraud, and want of due execution.[91] The court set aside Mrs. Albertsmeyer's will on a directed verdict. However, on appeal, the Indiana Supreme Court reversed the trial court holding that belief in the spirit world, in mediums, and in resort to mediums for advice from beyond were not insane delusions, and that Mrs. Albertsmeyer's will was not vitiated by her resort to a medium for guidance from beyond the grave.[92]

The frequency of "insane delusion" cases seems to have declined in the past thirty to forty years. The courts in most states have failed to generate a legal test for testamentary capacity out of the rule of *Dew v. Clark*. In Indiana, this failure may be due to the sharp decline in the number of will contests which reach the appellate

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[87]Addington v. Wilson, 5 Ind. 137 (1854) was eventually decided for the proponent on appeal. For cases decided against the proponent *see* Barr v. Sumner, 183 Ind. 402, 107 N.E. 675 (1915); McReynolds v. Smith, 172 Ind. 336, 86 N.E. 1009 (1909); Steinkuehler v. Wempner, 169 Ind. 154, 81 N.E. 482 (1907). *See also* Thompson v. Hawks, 14 F. 902 (C.C.D. Ind. 1883) (trial decision only).

[88]169 Ind. 154, 81 N.E. 482 (1907).

[89]*Id.* at 164, 81 N.E. at 486.

[90]*Id.*

[91]*Id.* at 155, 81 N.E. at 483.

[92]*Id.* at 164, 81 N.E. at 486. *But see* McReynolds v. Smith, 172 Ind. 336, 86 N.E. 1009 (1909).

level.[93] The "insane delusion" is an antiquated attempt to frame a rule which invalidates a will if the will is the product of mental disease. If the courts are willing to dust off this concept and apply what is currently known about mental illness, the courts could fashion an appropriate rule for setting aside wills for lack of mental competency of the testator.[94]

III. Undue Influence and Fraud in Indiana Will Contests

A. English Development of the Law of Undue Influence

The Statute of Wills contained no provision for avoiding wills on the ground of interference with the testator's free agency. Separate writs were available for an action of deceit in which it was alleged that some individual obtained another's property by fraudulent representations. Ecclesiastical law contained no specific canons dealing with wills obtained by overreaching. Bacon's Abridgment[95] mentioned that a will could be avoided if the testator's free will was overborne by another party. Judicial development of a ground for avoiding wills due to conduct of a beneficiary was slow. The first major case which treated undue influence as a separate ground for setting aside a will was *Mountain v. Bennet*.[96] In *Mountain*, the issue centered upon the validity of the will of the late Wilfred Bennet who left large real estate holdings to his wife. Bennet was described as "a debauched man" and as "fond of women."[97] Bennet made a secret marriage contract with a widow, Mrs. Harford. Shortly thereafter, Bennet made a will leaving his estate to his new wife.[98] Bennet's

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[93]This phenomenon is noticeable in both the Indiana Supreme Court, which has heard no will contest cases since 1949, and in the Indiana appellate courts, which heard only two will contests in 1970-79, five in 1960-69, and only nine in 1950-59. By contrast, during the decade of 1900-09 the supreme court heard twelve will contests, and in the decade 1890-99 the same court disposed of thirteen will contests.

[94]Although this Article deals with the capacity to make a valid will, much the same type of analysis would apply to invalidating trust deeds or agreements for want of capacity. The Indiana Trust Code spells out the standard for capacity to make trust deeds and testamentary trusts, leaving open the issue of a different standard for capacity in the case of trusts created by contract. Ind. Code § 30-4-2-10 (1976).

[95]7 M. Bacon, A New Abridgment of the Law 303-04 (5th ed. London 1798).

[96]29 Eng. Rep. 1200 (Ex. 1787).

[97]*Id.* at 1201.

[98]*Id.* at 1200. Lord Eyre in summation to the jury, regarding Mrs. Harford/Bennet/Parry's behavior, stated:

> It does not appear on the state of the evidence, that this woman originally threw herself in the way of Mr. Bennet; he was naturally a debauched man and fond of women; in that state he took a fancy to this woman . . . . There is actual proof of applications from him to her after the death of Mr. Harford for an interview, and he certainly was a volunteer in the business.

Id. at 1201. Parry's complicity in the design was not proved by any direct evidence,

heir objected to the probate of the will.

The case turned on whether the widow had conspired to induce Bennet to leave her his estate through importunity and favoritism. Lord Chief Baron Eyre concluded that:

> [I]f a dominion was acquired by any person over a mind of sufficient sanity to *general purposes*, and of sufficient soundness and discretion to regulate his affairs in *general*; yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind . . . . On a general view of this case, it must turn on one or other of these grounds; namely, either on the general capacity of Mr. Bennet to act for himself . . . or on the ground of a dominion or influence acquired over him by this woman, with whom he had most unfortunately connected himself.[99]

A generation later the Ecclesiastical Courts wrestled with an importuning beneficiary in *Kinleside v. Harrison*.[100] Andrews Harrison, the testator, made a will in June, 1808, followed by eight codicils.[101] The first four codicils were conceded to be valid. The last four codicils materially changed his testamentary plans to give a larger share of his estate to his vicar, the Reverend Mr. Kinleside.[102] These later codicils were attacked by caveats alleging that Andrews Harrison lacked testamentary capacity or, alternatively, was under the influence of a conspiracy consisting of Kinleside, Mrs. Jukes, Harrison's housekeeper, and Mr. Wells, Harrison's good friend.[103]

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but was solely inferred from a letter from Mrs. Harford/Bennet/Parry to Parry while she was Bennet's wife in which she told Parry that her husband was weak-minded and that she had an ascendancy over the sot. *Id.* at 1200.

[99]*Id.* at 1201.

[100]161 Eng. Rep. 1196 (Prerog. 1818).

[101]*Id.* at 1196-97. The first disputed codicil gave some books and pictures from Shawfield Lodge (the home Harrison built for his brother, John) to a Mr. Trevillian subsequent to John's life interest. The second disputed codicil revoked the appointment of Benjamin Harrison as executor and appointed Mr. Kinleside as co-executor in his place. The third disputed codicil was written by Andrews Harrison in his own hand. This codicil revoked the £5,000 legacy and the forgiveness of indebtedness previously made to Paul Malin and made Mr. Kinleside the residuary legatee to Harrison's property. The fourth and final disputed codicil was dated subsequent to the other disputed codicils. This codicil revoked all devises to Benjamin Harrison and Paul Malin, revoked the appointment of Harrison and Malin as co-executors, and turned over more personal property to Mr. Kinleside.

[102]*Id.*

[103]*Id.* at 1197-98. It was developed by the depositions of several witnesses that Paul Malin, the companion of John Harrison, had gone bankrupt, thus making the £13,000 debt uncollectible. Benjamin Harrison, who was no relation to either John or Andrews, but who was a close friend and business associate, apparently knew Malin

Andrews Harrison was subject to fits of temporary imbecility occasioned by an unknown disease.[104] These attacks left him senseless for some period of time[105] and his solicitor, Mr. Boodle, refused to let Harrison execute a codicil to his will when he believed Harrison to be imbecilic as a result of one of his attacks.[106] Andrews Harrison apparently discussed his codicils with Wells and Kinleside several times before they were actually executed.[107] The last two codicils were procured by Kinleside who took down Harrison's instructions and obtained a solicitor to draft the new codicils. These codicils were subsequently recopied by Harrison with assistance from Mrs. Jukes and were executed before the prescribed number of witnesses.[108]

After reviewing the depositions of the witnesses, Sir John Nicholl declared the four disputed codicils to be free from taint.[109] The court stated that Kinleside would likely have been guilty of obtaining the position of executor by undue influence if Kinleside had procured Harrison's signature on the codicil.[110]

The case contained few legal propositions about undue influence. However, the discussion of the evidence relating to the third and fourth disputed codicils took into account the friendship between Andrews Harrison and the Rev. Kinleside and their conversations in

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had gone bankrupt and failed either to warn the Harrisons or to protect their interest against Malin's insolvency. This all occurred early in 1813 and the result was that Andrews Harrison later cut Benjamin Harrison out of his will by his third and fourth contested codicils. *Id.* at 1227.

[104]*Id.* at 1204 (deposition of Curtis, John Harrison's coachman); *id.* at 1207 (deposition of Matthew Harrison, Benjamin Harrison's brother); *id.* at 1208-09 (deposition of Mr. Stanley, a friend of Andrews Harrison); *id.* at 1210 (deposition of Alexander, Mrs. Jukes' maid); *id.* at 1211 (deposition of William Taylor, Mrs. Jukes' footman); *id.* at 1215 (deposition of Mrs. Jukes, the person with whom Andrews Harrison resided from 1808 to his death); *id.* at 1215-16 (deposition of Mr. Roberts, Andrews Harrison's medical attendant); *id.* at 1217-18 (deposition of Mr. Wells).

[105]Mr. Roberts, a physician who visited with Andrews Harrison repeatedly during 1813-1814 when the disputed codicils were made, described these attacks. *Id.* at 1215-16.

[106]*Id.* at 1212-14.

[107]*Id.* at 1229-30. Mrs. Jukes apparently prevailed on Andrews Harrison to cut Malin and Benjamin Harrison out of his will but Taylor could not recall anything Mr. Wells may have said on the subject of altering the will, although Wells was a very frequent visitor to Harrison during 1813 and 1814.

[108]*Id.* at 1230-31. Taylor recounted a conversation between Mr. Harrison, who was quite deaf, and Mr. Kinleside, who was also hard of hearing, in which Kinleside told the gentleman to make a codicil rather than a whole new will. *Id.* at 1230.

[109]*Id.* at 1229-31. Wells' testimony showed that Kinleside procured the codicil which made him the residuary legatee of Andrews Harrison. The order to have the old man recopy the codicil in his own hand was an attempt to conceal procurement of the will.

[110]*Id.* at 1232.

a closed room relating to the alterations of the will in favor of the vicar.[111] Sir John Nicholl also strictly scrutinized the preparation and execution of the codicils which benefitted the vicar.[112]

A few years later, Lord Langdale crystalized the law of undue influence in *Casborne v. Barsham*.[113] *Casborne* involved an equity suit to set aside a deed on the grounds of fraud and undue influence.[114] The advisory jury found that the deed was not procured by fraud but was the result of Barsham's importuning his client for a preference to pay off Chandler's fee bill.[115] The Chancellor set aside the deed on this ground and Barsham appealed to Lord Langdale for a new trial.[116] Lord Langdale granted the motion and stated:

> [I]t is plain that there are transactions in which there is so great an inequality between the transacting parties—so much of habitual exercise of power on the one side, and habitual submission on the other, that without any proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this Court will impute an exercise of undue influence. Such cases have not unfrequently occurred in transactions between parent and child, and sometimes in transactions between persons standing to each other in the relation of solicitor and client.[117]

Casborne laid the foundation of 150 years of judicial gloss placed on a "confidential relationship" and the impact a finding of a "confidential relationship" has on a claim of undue influence. The early cases quickly found their way into English treatises on wills and evidence and crossed the Atlantic to become part of American jurisprudence.[118]

B. Early American Undue Influence Cases

New York, Pennsylvania, and South Carolina allowed wills to be set aside early in the nineteenth century because of undue influence by a beneficiary. These early cases followed the doctrinal statements set out in *Williams v. Goude*.[119]

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[111] *Id.* at 1230-31.

[112] *Id.* at 1232.

[113] 48 Eng. Rep. 1108 (Ch. 1839).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 1109.

[118] *See, e.g.*, 1 T. JARMAN, A TREATISE ON WILLS § 36, at 48 (3d ed. 1880) (1st ed. 1834).

[119] 162 Eng. Rep. 682 (Prerog. 1828).

> The influence to vitiate an act must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act: further, there must be proof that the act was obtained by this coercion—by importunity which could not be resisted: that it was done merely for the sake of peace so that the motive was tantamount to force and fear.[120]

Indiana's undue influence jurisprudence derived from a notorious series of South Carolina cases involving the estate of William B. Farr.

Will contests directed against Farr's last wills went to the South Carolina Supreme Court three times.[121] William B. Farr was a South Carolina planter who took up with a slave woman called Fan. Farr and Fan had a son, Henry Farr, whom Farr acknowledged as his issue. William Farr attempted to emancipate his son by a special act of the South Carolina legislature but could not obtain passage of his private act. When Henry Farr became 21, his father sent him to Indiana and settled an income upon him.[122] In 1828, Farr made his first will which left his estate to his mistress and to their son.[123] His second will, executed in August 1836, and a codicil of 1837 were set aside after two trials.[124] The second verdict for the contestant was sustained by the South Carolina Supreme Court on evidence showing that in 1836 and 1837 Farr was an habitual drunkard and imbecile.[125] The third trial resulted from caveats against the 1828 will. Again, the jury delivered a verdict for the contestant and the case was appealed.[126] The 1828 will was a devise of Farr's entire estate to J.B. O'Neall, his executor. The will was executed June 16th and on June 19th Farr wrote a letter to O'Neall which said:

> I want Fan and Henry to be free; I want Fan to have one half of my estate, and Henry the other half. When Fan dies,

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[120]*Id.* at 684.

[121]*See* Farr v. Thompson, 25 S.C.L. (Chev.) 37 (1839); Thompson v. Farr, 28 S.C.L. (1 Speers) 93 (1842) for the first two times this case appeared in South Carolina appellate reports. The first two reports contained many striking details of the relationship between Farr, his mistress, and their son which are not reported in O'Neall v. Farr, 30 S.C.L. (1 Rich.) 80 (1844). This case was the basis for Indiana's first major will contest, Kenworthy v. Williams, 5 Ind. 375 (1854), *overruled in part*, Blough v. Parry, 144 Ind. 463, 43 N.E. 560 (1896).

[122]25 S.C.L. (Chev.) at 38.

[123]*Id.* at 40.

[124]*Id.* at 49.

[125]Thompson v. Farr, 28 S.C.L. (1 Speers) 93, 101-03 (1842).

[126]O'Neall v. Farr, 30 S.C.L. (1 Rich.) 80 (1844).

> I want Henry to have half of Fan's half, and you the other half for your care and trouble of them; and should Henry die, leaving no wife nor child, I want you to have the whole of my estate forever. I want you to give Henry a good education, and do the best you can with him, and deal out his share to him as you think best, or as you think he will improve it. I want you to take Fan home with you, and build her a comfortable little house somewhere on your plantation, and let Fender and Cesley live with her as long as she lives.[127]

The evidence showed that in 1828 William Farr, although addicted to liquor, was a strong, healthy man in his mid-fifties with an independent mind.[128] Later, Farr indulged in drinking bouts with Fan which left them intoxicated and in mutual blind rage. In 1832, Farr suffered a stroke which left him partially paralyzed. Fan subsequently insulated Farr from the house servants and controlled Farr's business. There was testimony from Mr. Dawkins, an attesting witness to the invalid 1836 will, about the drinking bouts, fist fights, and threats with deadly weapons. Dawkins also testified that Fan importuned Farr to set her free at Farr's death.[129]

The supreme court reversed a jury verdict for the contestant as contrary to the weight of the evidence and ordered another new trial.[130] The court acknowledged that because of their sexual intimacy and their child, Fan had influence over her master inconsistent with the relationship of master and slave.[131] The court also acknowledged that Fan's influence over Farr's business and personal affairs increased from 1832 to 1836 to the point that Fan eventually acquired control over Farr's affairs.[132] However, the court found that the evidence did not sustain a finding that Fan had exercised *undue* influence over Farr in 1828. In reviewing the evidence at trial, the court said:

> As to what shall constitute undue influence, I can add but little to what is said in the case of *Farr vs. Thomson*, [sic] *Ex'or*. Cheves, 37. According to the authorities, it must be so great as, in some degree, to destroy free agency; an influence exercised over the testator to such an extent as to constrain him, from weakness or other cause, to do what is

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[127]*Id.* at 81.
[128]*Id.* at 82-83.
[129]25 S.C.L. (Chev.) at 40-41.
[130]30 S.C.L. (1 Rich.) at 90.
[131]*Id.* at 83.
[132]*Id.*

> against his will, but what he is unable to refuse. This influence may be obtained either by flattery, by excessive importunity, or by threats, or in any other way by which one person acquires a dominion over the will of another.[133]

The elements delineated in the quotation from *Farr* formed the basis for the Indiana Supreme Court's decision in *Kenworthy v. Williams*[134] in 1854.

C. *Undue Influence in Indiana*

The law of undue influence in Indiana has not been as effectively articulated as has the law of testamentary capacity. The best way to examine the structure of a claim for relief based upon undue influence is to isolate the elements which the Indiana courts have required before setting aside a will as the product of undue influence. In *Kenworthy*, the Indiana Supreme Court reviewed an appeal from the Henry Circuit Court. The trial judge sustained a demurrer to a five count petition to set aside the will of Stephen Gregg. Two of five counts alleged that Gregg's will had been procured through the "undue influence and improper conduct" of the defendants. The Indiana Supreme Court, citing *O'Neall v. Farr*,[135] stated that the particular facts on which undue influence might rest at trial need not be specifically pleaded by the contestant. The supreme court differentiated between ordinary fraud and undue influence. An action for fraudulent procurement of property required specific averments of the acts and words which constituted fraudulent inducements by the defendant.[136] However, a will contest based upon alleged undue influence by a beneficiary did not require the specific pleading of evidentiary facts amounting to fraud.

1. Susceptibility to Influence.—Nearly all Indiana cases dealing with undue influence concern a testator who was in poor health,[137]

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[133]*Id.* at 84.

[134]5 Ind. 375 (1854), *overruled in part*, Blough v. Parry, 144 Ind. 463, 43 N.E. 560 (1896).

[135]30 S.C.L. (1 Rich.) 80 (1844).

[136]*See, e.g.*, Baker v. McGinniss, 22 Ind. 257 (1864) in which the supreme court overruled a demurrer to a complaint to set aside a sale of hogs. The plaintiff's averment stated that the defendant sold plaintiff 27 hogs, representing them to be sound and healthy. The hogs in fact had cholera, which the defendant knew, and the plaintiff bought in reliance on defendant's statement to the contrary. The court held that this was a good plea of specific facts to support a claim for relief from fraud in the sale. *See also* Peter v. Wright, 6 Ind. 183 (1855) (bill to cancel deed and title bond, demurrer overruled, facts specific enough to set out cause for equitable relief on grounds of fraud).

[137]The "bad health" cases include occasional discussions by the court of the importunities of relatives and professionals, as in Deery v. Hall, 96 Ind. App. 683, 694-95, 175

under the influence of some sedative or alcohol, afflicted with what is commonly labeled by lay people as "senility,"[138] or suffering from some other mental or physical impairment. In *Folsom v. Buttolph*,[139] the Indiana appellate court quoted extensively from *In re Douglass' Estate*[140] in attempting to cope with the relationship between physical or mental impairment and undue influence, stating: " 'Undue influence exists when, through weakness, ignorance, dependence or implicit reliance of one on the good faith of another, the latter obtains an ascendency which prevents the former from exercising an unbiased judgment . . . .' "[141]

Many Indiana cases state that since the testator was a person of strong mind and stubborn character the issue of undue influence was either not present in the case and should have been taken from the jury,[142] or that the contestant failed to establish a prima facie case of undue influence.[143] In either situation, the courts consistently implied that undue influence cannot be proven unless the contestant shows that the testator was susceptible to influence by a potential beneficiary in the first place.[144]

2. Existence of Confidential Relationship Between Testator and Influencer.—Nearly all Indiana undue influence cases allege that the testator and the alleged undue influencer had a special relationship in which the testator placed trust in the influencer.[145] The rela-

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N.E. 141, 145 (1931) in which the appellate court scrutinized the conduct of the testator's priest and medical personnel at St. Vincent's hospital in Indianapolis, noting that the priest and the hospital were substantial beneficiaries under the testator's deathbed will.

[138]The number of cases in Indiana in which an elderly person was alleged to have been influenced by some relative or professional because of his or her senility is quite large. In Love v. Harris, 127 Ind. App. 505, 513, 143 N.E.2d 450, 455 (1957) the court indicated that undue influence is conducted in private and is rarely accompanied by the use of force.

[139]82 Ind. App. 283, 143 N.E. 258 (1924).

[140]162 Pa. 567, 29 A. 715 (1894).

[141]*Id.* at 568, 29 A. at 716.

[142]*See, e.g.*, Stevens v. Leonard, 154 Ind. 67, 70-75, 56 N.E. 27, 28-30 (1900).

[143]The decisions which hold that the contestant had not established a sufficient case to go to the jury on undue influence usually give a precise account of the evidence on the issue and point out that inferences of affection, respect, even importuning by family members, as well as solicitous conduct toward a testator by potential beneficiaries do not provide sufficient circumstantial evidence to go to the jury on undue influence. *See, e.g.*, Crane v. Hensler, 196 Ind. 341, 354-55, 146 N.E. 577, 581 (1925).

[144]The best American case on the substantive law of undue influence, In re Faulks' Will, 246 Wis. 319, 17 N.W.2d 423 (1945), adopts this element as one of the primary components of a claim or cause of action to set aside a will on grounds of undue influence. *Id.* at 335, 17 N.W.2d at 440.

[145]In this respect, Indiana also follows the guidelines established in *In re Faulks' Will*. The Wisconsin Supreme Court characterized this element as the "[o]pportunity to exercise such influence and effect the wrongful purpose." *Id.* at 335, 17 N.W.2d at 440.

tionships which courts have found capable of perversion into undue influence include attorney and client,[146] medical professional and patient,[147] agent and principal,[148] and parent and child.[149] The common element in each of these relationships is that the testator, induced by the closeness of the relationship, reposed confidence and trust in the alleged influencer. Indiana courts deem this situation a "confidential relationship" and allow proof of a confidential relationship between the testator and a beneficiary to be admitted as circumstantial proof of undue influence by the beneficiary.[150]

3. Use of a Confidential Relationship to Secure a Change in the Testator's Disposition of Assets at Death.—A will is the product of undue influence only *if* the testator gives some influencer more than the influencer would have taken by prior wills, deeds, or by intestate succession. There are only one or two Indiana cases in which the supreme court ordered the issue of undue influence withdrawn from the jury when the trial transcript showed evidence of a confidential relationship between the testator and the alleged influencer. In each case, the court correctly pointed out that any im-

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[146]*See, e.g.*, Breadheft v. Cleveland, 184 Ind. 130, 108 N.E. 5 (1915); Kozacik v. Faas, 143 Ind. App. 557, 241 N.E.2d 879 (1968); Workman v. Workman, 113 Ind. App. 245, 46 N.E.2d 718 (1943) (a cross-type in which the second spouse connived with a lawyer to obtain benefits from the testator). *See also* Arnold v. Parry, 173 Ind. App. 300, 363 N.E.2d 1055 (1977) (contestant alleged that lawyer cooperated with Salvation Army to gain testator's favor for the Salvation Army).

[147]There was an allegation in Deery v. Hall, 96 Ind. App. 683, 175 N.E. 141 (1931), that hospital personnel at St. Vincent's Hospital in Indianapolis may have influenced Dolan's testamentary scheme in favor of several Catholic charities. Indiana has no case of the caliber of *In re Faulks' Will* or of Gerrish v. Chambers, 135 Me. 70, 189 A. 187 (1937) in which a nurse used her control over an elderly patient to extract lifetime gifts from the patient in return for overly solicitous behavior.

[148]*See, e.g.*, Bank of America v. Saville, 416 F.2d 265 (7th Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970).

[149]*See, e.g.*, McCartney v. Rex, 127 Ind. App. 702, 145 N.E.2d 400 (1957); Hoopengardner v. Hoopengardner, 102 Ind. App. 172, 198 N.E. 795 (1935).

[150]The best doctrinal summary of the "confidential relationship" theory in Indiana case law appears in Keys v. McDowell, 54 Ind. App. 263, 100 N.E. 385 (1913):

> There are certain legal and domestic relations in which the law raises a presumption of trust and confidence on one side, and a corresponding influence on the other. The relation of attorney and client, guardian and ward, principal and agent, pastor and parishioner, husband and wife, parent and child, belong to this class and there may be others. Where such a relation exists between two persons, and the one occupying the superior position has dealt with the other in such a way as to obtain a benefit or advantage, the presumption of undue influence arises . . . . Upon the issue of undue influence, such a presumption arising in favor of the party having the burden of proof makes a prima facie case; and, if no evidence is introduced tending to rebut such presumption, he is entitled to a verdict or finding in his favor upon that issue . . . . *Id.* at 54 Ind. App. 269, 100 N.E. 387.

portuning by the alleged influencer did not change earlier dispositions made by the testator and did not, therefore, constitute undue influence.[151]

4. The Testator Changed His or Her Disposition.—To have a will set aside as the product of undue influence, Indiana case law requires a testator to make a change of testamentary disposition. Indiana law regards several kinds of events as a change of testamentary disposition. Indiana cases hold that making a new will in favor of the influencer is a change of disposition.[152] The cases also hold that a testator's revocation of a will in order that he may die intestate is a change of disposition.[153] Finally, an inter vivos transfer of property to an influencer in excess of what the influencer could expect at death is also held to be a change of disposition.[154]

5. The Change of Disposition Was Unconscionable.—Unconscionability is difficult to define, but easy to illustrate. In *Crane v. Hensler*,[155] contestants alleged that the testator's second wife importuned the testator to make a will favoring her and her own children by a prior marriage over the testator's children by his first wife.[156] The Indiana Supreme Court set aside a jury verdict for the contestants and ordered a new trial due to an erroneous instruction to the jury about undue influence.[157] In *Brelsford v. Aldridge*,[158] the testator disinherited his only child in favor of his mistress. After executing his will, and just prior to his death, the testator married his

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[151]*See, e.g.*, Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 205 N.E.2d 562 (1965). This portion of the elements which constitutes undue influence received special attention in Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME LAW. 197 (1970).

[152]Nearly all contests claim the testator made a subsequent will which favored the influencer. *See, e.g.*, Jones v. Beasley, 191 Ind. 209, 131 N.E. 225 (1921); Davis v. Babb, 190 Ind. 173, 125 N.E. 403 (1921); Robbins v. Fugit, 189 Ind. 165, 126 N.E. 321 (1920).

[153]*See generally* Barnes v. Bosstick, 203 Ind. 299, 179 N.E. 777 (1932). Although there are no Indiana will contest cases in which the contestant alleged a prior will was revoked under undue influence, thus permitting the testator to die intestate, Indiana courts would likely adopt the holding of *In re* Marsden's Estate, 217 Minn. 1, 13 N.W.2d 765 (1944), which concluded that the revocation of a testatrix' will procured from her on her death bed by the surviving children, cancelling a devise to her granddaughter and housekeeper, and causing the estate to be divided equally among the five living children of the testatrix, was void as the product of undue influence.

[154]The Indiana cases setting aside deeds of real estate and gifts of personal property in anticipation of death as the result of undue influence include Westphal v. Heckman, 185 Ind. 88, 113 N.E. 299 (1916); Wray v. Wray, 32 Ind. 126 (1896); Gwinn v. Hobbs, 72 Ind. App. 439, 118 N.E. 155 (1917); Beavers v. Bess, 58 Ind. App. 287, 108 N.E. 266 (1915); McCord v. Bright, 44 Ind. App. 275, 87 N.E. 654 (1909).

[155]196 Ind. 341, 146 N.E. 577 (1925).

[156]*Id.* at 353-55, 146 N.E. at 580-81.

[157]*Id.* at 352-53, 146 N.E. at 580-81.

[158]42 Ind. App. 106, 84 N.E. 1090 (1908).

mistress. The appellate court reversed a judgment for the defendant on the ground that the trial court erred in refusing to let the testator's daughter testify that she enjoyed good relations with the testator.[159] The distinction between the two cases lies in the social acceptability of the actions of the woman in each case. In *Crane*, the second wife was within her perquisites as a wife in placing pressure on her husband to favor her with a new will. On the other hand, *Brelsford* showed that a mistress may not importune her lover for a legacy since she had no preferential status at law. Therefore, a will leaving an entire estate to a mistress is unconscionable while a will leaving all to a second wife is not.

In summary, Indiana law recognizes undue influence as a claim for relief against a will, deed, contract, or trust instrument which arises when a person who is susceptible to influence by others as a result of mental or physical infirmity establishes a confidential relationship with another person. If that person uses the confidential relationship to manipulate the testator, grantor, or settlor in order to force that individual to change his testamentary plans or lifetime gift plans to favor the influencer, and if the results of that change are socially unacceptable or unconscionable, then the person exercising such importunities will be held to be an undue influencer. A claim for relief may be heard against any benefits secured by the influencer or any confederates as a proximate result of the undue influence.

D. A Rogue's Gallery of Undue Influencers

In many instances, whether the court decides in favor of the contestant or proponent depends in large measure upon the type of person exerting the influence. The status of the individual exerting the influence determines the outcome of a will contest more consistently than propositional legal statements about burdens of proof and presumptions. Since Indiana case law provides a colorful gallery of rascals and rogues engaged in undue influence, a review of the five types of undue influencers will be profitable.

1. David and Bathsheba Cases.[160]—Many undue influencers play the role of Bathsheba, the second wife of King David of Israel, and importune their spouse for preferment against the children of a former marriage. There are thirteen such cases in Indiana jurisprudence which are exemplified by *Workman v. Workman.*[161]

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[159]*Id.* at 109, 84 N.E. at 1091.

[160]Bathsheba's importuning to David for favoritism for her son against Adonijah is recounted in 2 *Samuel* 12:24 and 1 *Kings* 1:11-38. A "David and Bathseba" will contest is a will contest on the ground of undue influence exercised by a second spouse to secure favor over children of the testator by a prior marriage.

[161]113 Ind. App. 245, 46 N.E.2d 718 (1943).

John T. Workman had three children by his first wife who died March 30, 1932. John Workman's life style changed dramatically after his first wife's funeral. He frequented local saloons in the company of a young lawyer named Herbert Lane and consumed enormous quantities of liquor each day. The case report does not disclose whether Lane introduced Workman to a divorcee named Ida Sutton. However, Workman married Ida Sutton within two years after his first wife's death.[162] Lane took Workman on weekend trips and, in 1937, Lane took Workman for an eastern summer vacation.[163] When they returned from the trip east, Workman had Lane draw up a deed conveying all his real estate to Ida Workman.[164]

On March 25, 1938, Herbert Lane and Ida Workman took John Workman to a hospital in Louisville, Kentucky for treatment of rectal cancer. Workman was placed under heavy sedation.[165] John's only living child, Ott Workman, was neither notified that his father was ill, nor where his father had been taken until sometime later when his father lay dying.[166] In late March, Lane drew up a will for Workman giving the remainder of Workman's property to Ida and to her son by a prior marriage, Norval Sutton.[167] Lane never read the will to Workman in the presence of the attesting witnesses and it was unclear whether John Workman knew what he was doing when he signed the will. Some days later, when Ott finally located his father and came to Louisville to see him, John Workman asked Ott to get a lawyer to make a will leaving all his property to Ott.[168]

On this evidence, the Orange Circuit Court entered judgment on a jury verdict for the contestant.[169] The Indiana Appellate Court, finding no reversible error, affirmed the verdict on appeal.[170] The pattern of overreaching and importuning by Herbert Lane and Ida Workman to secure John Workman's estate was conduct which the court was willing to call unconscionable and outrageous. It exceeded what the court felt was the appropriate degree of pressure a second spouse may bring on his or her mate to secure a testamentary advantage.

2. *Esau and Jacob Cases.*[171]—Will contests often develop be-

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[162]*Id.* at 270-71, 273-74, 46 N.E.2d at 727-29.

[163]*Id.* at 271, 46 N.E.2d at 728.

[164]*Id.*

[165]*Id.* at 274, 46 N.E.2d at 729.

[166]*Id.* at 271, 46 N.E.2d at 728.

[167]*Id.* On the same day that Workman signed his will, he also signed stock certificates over to his lawyer, Lane. Lane had to guide the old man's hand in making the signatures to these instruments. *Id.*

[168]*Id.* at 274, 46 N.E.2d at 729.

[169]*Id.* at 252, 46 N.E.2d at 720.

[170]*Id.* at 280, 46 N.E.2d at 731.

[171]The well-known story of Esau, who sold his birthright to Jacob for a pottage stew, and Jacob's deceitful obtaining of the first-born son's inheritance from his blind,

tween children of a testator. In these inter-sibling fracases, one sibling often accuses the other of exerting undue influence over the deceased parent. There are twenty-six Indiana decisions which fit this pattern of alleged undue influence.

In 1936 the Indiana Appellate Court reviewed *Hoopengardner v. Hoopengardner*,[172] a typical Esau and Jacob case. Lewis Hoopengardner owned a large farm in Wells County. His wife died in 1928, and until his son, Jasper, returned home, he had promised his children that he would divide his estate equally among them. The old man promptly became angry with his other children over trifles and changed his disposition toward them. The elder Hoopengardner went everywhere in the company of Jasper and agreed orally with Jasper that if Jasper would take care of him in his declining years he would deed the home farm to Jasper. Finally, the old man, then near 90, in addition to the inter vivos transfer of the home farm to Jasper for nominal consideration made out a will leaving the bulk of his personal estate to Jasper.[173] The trial court entered judgment on a jury verdict for the contestant which was affirmed on appeal.[174]

In *Hoopengardner*, Jasper Hoopengardner did essentially nothing for his father except befriend him. In return for his companionship, Jasper received an inter vivos transfer of all his father's real estate and a favored position in his father's will. The court in *Hoopengardner* apparently reasoned that the gifts to Jasper were unconscionable in relation to Jasper's potential claim for services. This seems to be the line of demarcation in such cases.[175]

3. The Judge Jaffrey Pyncheon Cases.[176]—Nine Indiana will contests deal with a will in which the undue influencer is alleged to have been a brother, sister, niece, or nephew of the testator.

Gurley v. Park[177] represents the type of Jaffrey Pyncheon case

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dying father, Isaac, is recounted in *Genesis* 25:30-34, 27:6-38, 27:41-45, 32:1-32 and 33:1-20. An "Esau and Jacob" contest is a will contest in which the contestant alleges that his or her sibling or half-sibling importuned their parent for a greater share of the parent's estate.

[172]102 Ind. App. 172, 198 N.E. 795 (1935).

[173]*Id.* at 173, 198 N.E. at 795.

[174]*Id.* at 174, 198 N.E. at 796.

[175]*But cf.* McCartney v. Rex, 127 Ind. App. 702, 145 N.E.2d 400 (1957) (decision for the proponent on similar facts when the influencer actually took physical care of the testator for some time).

[176]The "Jaffrey Pyncheon" cases resemble the actions of Judge Jaffrey Pyncheon, the villain of Nathaniel Hawthorn's HOUSE OF THE SEVEN GABLES. In a Judge Pyncheon will contest, the influencer is a collateral relative of the testator, who importunes and intrigues his collateral, as Judge Pyncheon did, to gain testamentary favors. Judge Pyncheon disguised his uncle's death to give the appearance of a murder, and then Jaffrey "framed" Clifford Pyncheon in order to gain the inheritance.

[177]135 Ind. 440, 35 N.E. 279 (1893).

in which the influencer generally loses.[178] Mary B. Park, the testatrix, was very old, infirm, and deranged. On her death bed, she executed a will disinheriting her son after being importuned by her brother to leave her property to the brother's two children in preference to her own son who was in financial need.[179] Mrs. Park was something of a recluse and made statements to other persons in the years immediately before her death that she would leave them her property. The jury verdict and judgment casting out her will was sustained by the Indiana Supreme Court as supported by the evidence at trial.[180] In this case, the importuning brother obtained a will in favor of his own children at the expense of a lineal descendant. The case abounded with evidence of Mrs. Park's susceptibility to influence and of the conscious connivance of her brother to secure an estate for his own children.

4. The Uriah Heep Cases.[181]—In recent years, importuning family members have been replaced in undue influence cases by importuning professional persons. Six of the nine Uriah Heep will contests in Indiana are twentieth century cases. Four of the nine cases have been decided since World War II. The common element in all of these cases is that the person alleged to have exerted undue influence over the testator was the testator's lawyer, physician, or agent rather than a family member.

Kozacik v. Faas[182] illustrates the kind of Uriah Heep will contest in which the contestant may prevail. Katherine Yaeger executed her will August 30, 1963. The principal beneficiary under her will was Andrew M. Kozacik, a lawyer.[183] Mrs. Yaeger's estate amounted to slightly less than $6,000. Her son, Anthony Faas, filed a will contest alleging that his mother's will had been procured by Mr. Kozacik's undue influence. At trial, Mr. Kozacik stated he received no compensation for drawing Mrs. Yaeger's will or for the other services he performed for the testatrix for the seven years prior to her death.

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[178]*But see* Stevens v. Leonard, 154 Ind. 67, 56 N.E. 27 (1900) for a decision for the proponent in which the influencer denied knowledge of the testator's revised will.

[179]135 Ind. at 444, 35 N.E. at 280.

[180]*Id.*

[181]Uriah Heep was the law clerk in Charles Dickens' DAVID COPPERFIELD. Heep importuned his employer's clients for benefits in order to attract away his master's business. Eventually Heep displaced his employer and then took over the management of the affairs of David Copperfield's benefactor. An "Uriah Heep" will contest is a contest in which the influencer, a professional person, importunes the client or patient for benefits.

[182]143 Ind. App. 557, 241 N.E.2d 879 (1968). *Contra*, Arnold v. Parry, 173 Ind. App. 300, 363 N.E.2d 1055 (1977).

[183]143 Ind. App. at 561, 241 N.E.2d at 881. The gift of the residuary estate was preceded by a provision in the testatrix' will requiring the executor to collect a debt of $16,300 from her son for the benefit of the residuary legatee.

The Starke County Circuit Court was not swayed by Kozacik's evidence in support of the will and entered judgment setting aside the will as the product of Mrs. Yaeger's unsound mind and the undue influence of Mr. Kozacik.[184] The appellate court affirmed the trial court. The court took the opportunity to warn Indiana lawyers that preparing a will for a client which included the lawyer-drafter as beneficiary under the will was an "exceedingly bad practice . . . especially when the terms of the will fail to make any provisions to the natural objects of her bounty. . . ."[185]

5. *The Mary Worth Cases.*[186]—Six Indiana cases decided in this century alleged that the undue influencer was a non-professional friend of the family who intervened as helper and counselor to the testator. In each case, the kindly friend ended up with a substantial portion of the testator's estate at the expense of blood relatives.

Davis v. Babb[187] is representative of the Mary Worth cases in which the proponent generally loses. Mary L. Taylor, an elderly widow, had been living with her brother, Edmund Babb, in Jennings County for some time when Edmund died in March 1906. Following Edmund's death, William C. Davis became the dominant influence in Mary Taylor's life. He obtained a deed of trust from her for the family farm in Jennings County which made him trustee over the farm.[188] Mr. Davis corresponded extensively by letter with Mrs. Taylor and detailed how to handle her money and how to give it away at her death.[189] Mrs. Taylor told her family that she intended to leave her estate to two nieces, Hattie Sargent and Lucy Boyd.[190] It appeared from the evidence that she also told everyone how much she feared and distrusted Davis. During this period of time, Davis had also taken possession of her 1906 will and removed it to Cincinnati where he placed it in a joint safety deposit box. When Mrs. Taylor wanted to make a codicil, she contacted Mr. Davis and had him bring the original will from Cincinnati to Jennings County. There was evidence that Davis either took notes on the contents of the 1906 will or wrote it himself.[191] When Mrs. Taylor died in 1914, Davis took the will and codicil out of the joint safety deposit box in Cincinnati and presented it for probate in Vernon. Mrs. Taylor's

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[184]*Id.* at 560, 241 N.E.2d at 880.

[185]*Id.* at 566, 241 N.E.2d at 884.

[186]Mary Worth was the principal character in the King Features Syndicate, Inc. comic strip of the same name. She was a neighborhood busybody and do-gooder who had no family of her own, and spent her time importuning the neighbors and meddling altruistically in their private lives.

[187]190 Ind. 173, 125 N.E. 403 (1919). *Contra*, Muson v. Quinn, 110 Ind. App. 277, 37 N.E.2d 693 (1941).

[188]190 Ind. at 186, 125 N.E. at 408.

[189]*Id.* at 179-80, 125 N.E. at 405.

[190]*Id.* at 185-87, 125 N.E. at 406-08.

[191]*Id.* at 186-87, 125 N.E. at 408.

brother and her nieces filed objections to probate which ended in a jury verdict for the contestant on grounds of lack of capacity and undue influence by Davis.[192] The Indiana Supreme Court, after reviewing the slender evidence at trial on Mrs. Taylor's lack of capacity, detailed the instances of overreaching conduct on the part of William Davis. The court concluded that the verdict and judgment should be affirmed.[193]

The Indiana Supreme Court held that undue influence could be proven from circumstantial evidence alone. Davis' long history of intervention in Mrs. Taylor's affairs was strong circumstantial evidence of his undue influence over her.[194] The circumstances surrounding the making of both the 1906 will and the 1913 codicil suggested that Davis consciously managed Mrs. Taylor's affairs so that she could not help but make him the principal beneficiary of her will.[195]

IV. A Footnote on Fraud in Indiana Will Contests

A. The Theory of a Will Contest Based on Fraud

Fraud has been one of the independent grounds for setting aside a will in Indiana since 1852. Of all Indiana will contests surveyed,

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[192]*Id.* at 177-78, 125 N.E. at 405.

[193]*Id.* at 191, 125 N.E. at 409.

[194]*Id.* at 180-81, 125 N.E. at 406.

[195]*Id.* at 186-87, 125 N.E. at 408.

A survey of Indiana will contests reveals that the outcome in will contest cases reflects the status of the beneficiary who is the alleged influencer. Disregarding for the moment the presence or absence of a lack of capacity claim in alleged undue influence cases, some interesting results emerge. For example, of the thirteen "David and Bathsheba" undue influence cases, ten trial decisions were in favor of the contestant and three were in favor of the proponent. After appeal, ten proponents were winners while only three contestants remained winners. Of the twenty-six "Esau and Jacob" undue influence cases, seventeen originally favored the contestants, but fifteen appellate decisions favored the opponents. Of the six "Mary Worth" cases, four trial court decisions favored the contestants but only two survived the appeal. However, in nine "Uriah Heep" cases, of the six trial decisions favoring the contestants, only one was reversed on appeal.

Of all will contests in which undue influence was alleged, 37.7% were trial decisions for the proponent and 62.3% were trial decisions for the contestant. The results after appeal were exactly reversed. The implication of this is that the Indiana appellate courts have applied the brakes to trial court decisions which invalidate wills. This is evidenced by the fact that only 24.3% of all trial decisions for the proponent were reversed on appeal while 55.7% of the trial court decisions for the contestant were reversed on appeal. Conversely, 75.7% of all decisions for the proponent at the trial level were affirmed while only 44.2% of all trial decisions for the contestant were affirmed. Contestants in Indiana will contests stand about a two to one chance of winning a trial and about a three to two chance of having that trial verdict and judgment reversed on appeal. The impact of this long history of judicial protectionism has surely been to discourage attacks on wills on the ground of undue influence.

25.2% included an allegation that the will in question was procured by fraud. Two cases were based on fraud alone. Two more were brought on the grounds of fraud and want of due execution.[196] In *Frye v. Gibbs*,[197] the contestant alleged that the testator's signature had been forged to her will. According to the Indiana Appellate Court, this allegation was not supported by the evidence in the case and the trial decision for the proponent was affirmed.[198] *Barger v. Barger*[199] also turned on the proof of a forged signature to a will. The decision sheds little light on the elements of fraud as an independent cause for setting aside a will in Indiana.[200]

However, *Orth v. Orth*[201] laid a foundation for later Indiana jurisprudence on fraudulent procurement of wills. Godlove S. Orth had been twice married. He had a son William by his first wife, and Harry and Mary by his second wife, Mary Ann Orth, who survived him.[202] Orth executed a will in 1882 which was accompanied by a letter of instruction to his second wife defining how she should handle the administration of his estate to avoid losing the bulk of his real estate to creditors.[203] Orth's will devised his real estate holdings in several Indiana counties to Mary Ann in fee simple and all his personal property to Mary Ann absolutely.[204] Godlove Orth's letter to Mary Ann contained the following statement:

> In a word, act carefully, prudently, and under such good advice as you can procure, *and act justly towards yourself and towards all my children*, and I shall be content. My desire in this matter is that all my debts be paid, that you have a competence during your life, *and then, what is left give to all the children alike.*[205]

Mary Ann Orth's own will left her estate to her two children and excluded William Orth entirely. William Orth died shortly after his stepmother. William's children then brought a lengthy complaint to set aside Mary Ann Orth's will or, in the alternative, to impress her estate with a constructive trust in favor of William Orth's children

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[196]*See* Table 18 in Appendix A to this Article held by publisher.

[197]139 Ind. App. 73, 213 N.E.2d 350 (1966).

[198]*Id.* at 77, 213 N.E.2d at 352.

[199]221 Ind. 530, 48 N.E.2d 813 (1943).

[200]The case was decided on the issue of the exclusion of the testator's statement that he had made a will, uttered after the alleged forgery. *Id.* at 533-35, 48 N.E.2d at 814-15.

[201]145 Ind. 184, 42 N.E. 277 (1896).

[202]*Id.* at 184-86, 42 N.E. at 277-78.

[203]*Id.*

[204]*Id.* at 191, 42 N.E. at 279.

[205]*Id.* at 186, 42 N.E. at 277 (emphasis added).

on the theory that Mary Ann Orth procured Godlove Orth's estate by fraudulently representing to him that she would divide the residue at her death equally between the three children of Godlove Orth.[206] The complaint further alleged that the letter of Godlove Orth created a trust on the bequest in favor of the three Orth children or, alternatively, gave Mary Ann only a life estate with remainder in fee simple in the three Orth children per stirpes.[207] The complaint demanded enforcement of the express trust or imposition of a constructive trust. The trial court sustained the defendant's demurrer to the complaint and the contestants appealed.

The Indiana Supreme Court first stated that Godlove Orth's letter, by itself, could not be the foundation for an express trust.[208] The court further stated that the letter together with Mary Ann Orth's statements to William Orth that she would carry out the terms of Godlove's letter in his favor likewise did not create an express trust.[209] If the letter alone did not create a trust, the "trustee's" statements to a beneficiary could not add any support to the letter in the creation of an express trust.[210]

The court then examined the transaction in terms of fraudulent procurement by Mary Ann Orth:

> If Mrs. Orth, by fraud, had procured the execution of the will in this case, equity would have held her a trustee for the benefit of those entitled by law to the property. Possibly, if the testator had, after the execution of his will, manifested a desire to create a specific legal trust in behalf of his children, and Mrs. Orth had, by fraud, dissuaded him, equity would have ridden over the fraud . . . . Here we have no showing that Mrs. Orth procured the will to be written in the present form, nor have we allegations of an intention on the part of the testator, subsequent to the execution of the will, to execute another and different will, including . . . a trust of the character of that here claimed. . . . It is alleged generally that Mrs. Orth "dissuaded the said Godlove from making changes in his said will in favor of the said William M. Orth, or making other provisions for him, which he would otherwise have done," but it is nowhere alleged that the testator expressed a desire to, and was by fraud dissuaded from making a trust . . . .[211]

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[206] *Id.* at 187-90, 42 N.E. at 278-81.

[207] *Id.*

[208] *Id.* at 192-93, 42 N.E. at 279.

[209] *Id.* at 194, 42 N.E. at 281.

[210] *Id.*

[211] *Id.* at 201-02, 42 N.E. at 282.

The court affirmed the lower court's ruling on the demurrer.[212]

Orth shows that Indiana recognizes a cause of action for setting aside a will on the ground of fraudulent procurement or inducement. The cause of action for fraud was not merged into a cause of action for undue influence.[213] This cause of action for fraud follows the ordinary rules relating to any tort claim of fraudulent misrepresentation.

The Indiana Trial Rules continue the common law requirement that fraud be specifically set out in the complaint.[214] Indiana case law requires a litigant to offer proof of intent to defraud or to obtain property under false pretenses, in order to recover.[215] This special intent, called "scienter," requires the actor to make some kind of misrepresentation while aware that the representation is made to a particular individual and that the representation conveys some meaning which will be believed and acted upon by that individual.[216] Decisional law in Indiana established four elements to actionable fraud:

> (1) that the defendant make a material representation of past or existing facts;
> (2) that the representation was made with knowledge of its falsity, or with reckless disregard for the truth of the statement made;
> (3) that the defendant's statement induced the plaintiff to act to his or her detriment; and
> (4) that as a proximate result, the plaintiff was injured.[217]

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[212]*Id.* at 206, 42 N.E. at 284.

[213]*See* text accompanying notes 134-36, *supra*.

[214]*See* IND. R. TR. P. 9(B).

[215]*See, e.g.*, Kirkpatrick v. Reeves, 121 Ind. 280, 281-82, 22 N.E. 139, 140 (1889); Peter v. Wright, 6 Ind. 183, 188-89 (1855). According to Hutchens v. Hutchens, 120 Ind. App. 192, 199, 91 N.E.2d 182, 185 (1950), actual fraud consists "of deception intentionally practiced to induce another to part with property or surrender some legal right," and its essential elements consist of "false representation, *scienter*, deception and injury." *Id.* (emphasis added). *See also* Baker v. Meenach, 119 Ind. App. 154, 160, 84 N.E.2d 719, 722 (1949).

[216]*See, e.g.*, Vernon Fire & Cas. Ins. Co. v. Thatcher, 152 Ind. App. 692, 285 N.E.2d 660 (1972) for the best contemporary restatement of Indiana's law of scienter.

[217]The elements of actionable fraud in Indiana have been stated by the courts in several different ways. For example, in Auto Owners Mut. Ins. Co. v. Stanley, 262 F. Supp. 1, 4 (N.D. Ind. 1967), Judge Grant stated the elements of actionable fraud to be "(1) representations of material facts; (2) reliance thereon; (3) falsity of the representations; (4) knowledge of the falsity; (5) deception of the defrauded party; and (6) injury." In Coffey v. Wininger, 156 Ind. App. 233, 296 N.E.2d 154 (1973), the appellate court stated the elements of fraud as "a material misrepresentation of past or existing facts, made with knowledge (scienter) or reckless ignorance of this falsity," which causes the

If the plaintiff can prove these elements by a preponderance of the evidence, the plaintiff should be able to have a will or other dispositive instrument set aside on the ground of fraudulent procurement.

V. Two Incidents

The last part of this exposition of Indiana will contests deals with two incidents in a lawyer's file which relate to the doctrinal materials presented earlier. The first case deals with preventive law practice in the law office. It is intended for a general audience. The second case is an evaluation of a client's story by a trial attorney in order to decide whether the client has any probability of success in a will contest should the lawyer agree to take it. Although this case certainly concerns general practitioners, it is slanted toward active trial attorneys who must make a quick review of the potential in a case of this type. Each case involves the application of both the

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plaintiff to change his or her position in detrimental reliance thereon. *Id.* at 239, 296 N.E.2d at 159. This formula was restated in Blaising v. Mills, 374 N.E.2d 1166, 1169 (Ind. Ct. App. 1978). The most recent supreme court case dealing with the elements of the tort of fraudulent misrepresentations, Automobile Underwriters, Inc. v. Rich, 222 Ind. 384, 53 N.E.2d 775 (1944), stated the elements of actionable fraud as (1) false representations made for a fraudulent purpose (2) believed by a party to whom they were made (3) who was thereby induced to act thereon and (4) resulting in effecting a fraud. *Id.* at 390, 53 N.E.2d at 777 (quoting Watson Coal & Mining Co. v. Casteel, 68 Ind. 476 (1879)). The standard for proof of fraud is the preponderance of the evidence test. Grissom v. Moran, 154 Ind. App. 419, 427, 290 N.E.2d 119, 123 (1972); Automobile Underwriters, Inc. v. Smith, 131 Ind. App. 454, 466-67, 166 N.E.2d 341, 348 (1960); Holder v. Smith, 122 Ind. App. 371, 377, 105 N.E.2d 177, 180 (1952). *See also* United States v. 229.34 Acres of Land, 246 F. Supp. 718, 722 (N.D. Ind. 1965) (applying Indiana law). The burden of proof in Indiana will contests in which fraudulent procurement of a will is alleged is the same as the burden of proof for undue influence and lack of capacity (proof by a preponderance of the evidence). There is no reason to increase the burden of proof in a will contest to clear and convincing evidence when the standard for fraud in ordinary civil litigation is by a preponderance of the evidence.

Other statements of the defendant which are fraudulent are admissible as an exception to the hearsay rule. *See, e.g.*, Physicians Mut. Ins. Co. v. Savage, 156 Ind. App. 283, 289-90, 296 N.E.2d 165, 169 (1973) (scienter proved by statements made by insurer's agent to insured's executor and by executor's responses); Coffey v. Wininger, 156 Ind. App. 233, 243-44, 296 N.E.2d 154, 161 (1973) (constructive fraud proven by evidence of vendor's statement to purchaser of land and purchaser's replies); Bob Anderson Pontiac, Inc. v. Davidson, 155 Ind. App. 395, 397-99, 293 N.E.2d 232, 233-34 (1973) (scienter established by evidence that the defendant tampered with the odometer in order to show a lower mileage than actually existed); Colonial Nat'l Bank v. Bredenkamp, 151 Ind. App. 366, 370-71, 279 N.E.2d 845, 846 (1972) (in bank fraud action, statements by bank officer to plaintiff about securing loan and plaintiff's replies admitted to show scienter); Automobile Underwriters, Inc. v. Smith, 131 Ind. App. 454, 465-66, 166 N.E.2d 341, 347-48 (1960) (release obtained from plaintiff by statements by insurance adjuster; entire conversation between plaintiff and adjuster admitted to show scienter).

substantive law pertaining to lack of capacity, undue influence, and fraud, and the procedural principles implicated by each case.

A. Fred Lott: An Exercise in Preventive Law[218]

Fred Lott, 53, is a bachelor. He lives alone in a run-down house in a poor neighborhood. Fred is known around town as a recluse. He seldom leaves his home except to buy groceries at a neighborhood store and to collect rent from his tenants. Fred owns several run-down one and two-family houses from which he appears to receive most of his ready money. His nearest relatives are two sisters, Grace Brown and Viola Wilson, who live with their families out of state. Fred Lott has been buying and selling cheap rental housing for several years. In order to enhance his choices in real estate investment, Lott has been consulting Mrs. Seldon, a medium, who lives near his home. Over the years, the firm of Blackford and Morton has performed real estate title work and other incidental tasks for Mr. Lott. Lott appeared in the reception room one afternoon asking for an appointment to make a will and Oliver P. Morton agreed to see him.

After taking an inventory of Lott's assets, which proved to be considerably larger than Morton had supposed, Morton asked Fred Lott what he wanted to do with his property at death. Lott told Morton that he had been thinking the matter over for some time. He had no desire to give his property to his two sisters or to their children. Fred said that relations with his two sisters had been strained for years. He did not see them often and he did not know the names of their children. Intuition told Morton that Fred's sisters disapproved of Fred's strange behavior.

Fred Lott spent a lifetime amassing a collection of antique glassware. Fred valued the collection at slightly more than $10,000 of the $340,000 he estimated as his net worth. Much of this collection had been purchased through the efforts of Ralph Smith, a local antique dealer, who, according to Fred, was his only real friend. Ralph Smith was also a bachelor. Lott wanted to leave his collection and his real estate to Smith at this death and to will the remainder of his assets to the Indiana Historical Commission. This recitation created some immediate inner conflicts which Morton had to resolve. Morton promised to study the information Fred had given him and to contact Lott in a week to discuss what alternatives Fred might wish to follow in making out his will. After Fred left, Oliver Morton wrestled with his doubts about the situation. Fred was a

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[218]Any similarity between the characters described in Part V of this Article and any real person, living or dead, is purely coincidental.

strange individual. He was unconventional and some people would consider his behavior bizzare. Was he mentally competent to make a will? Was it even Morton's business to question the mental competency of a client? What kind of relationship existed between Fred Lott and Ralph Smith? Why did Lott want to give the bulk of his estate to Smith rather than his family? If Fred Lott went to mediums about buying and selling real estate, had he also consulted a medium about his will? Was there any plan to get Fred Lott's money from him by false pretences? Should Morton have dared to ask his client such questions?

Since Morton is an office lawyer and does not regularly do trial work, his appraisal of Fred Lott's situation has two elements. First, in order to serve his client and avoid liability for professional malpractice, what could Morton do to ensure that Lott's will would be upheld in a later contest? Second, Morton needs to give Lott an accurate forecast of the probability of an attack upon his will after his death and the likelihood of its success. This will help Lott decide whether he really wants to go through with the disinheriting process.

B. A Lawyer's Duty with Respect to a Client's Capacity to Act for Himself

Ordinarily, a lawyer is obliged to handle a client's business with the same standard of care that other lawyers would customarily provide for the client in similar situations.[219] Likewise, a lawyer must possess and exercise the same kind of skill which would be

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[219]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161-66 (4th ed. 1971). Indiana courts faced the question of the attorney's duty to his or her client in the mid-nineteenth century. In Reilly v. Cavanaugh, 29 Ind. 435 (1868), the supreme court held that a lawyer was liable for the consequences of his or her "ignorance, carelessness or unskillfulness, just as a physician is for his malpractice." *Id.* at 436. In Hillegass v. Bender, 78 Ind. 225 (1881), the supreme court held that a lawyer is "bound to possess and exercise competent skill, and if he undertakes the management of a law affair, and neither possesses nor exercises reasonable knowledge and skill, he is liable for all loss which his lack of capacity or negligence may bring upon his clients." *Id.* at 227. Finally, the appellate court stated what can be taken as a pattern instruction to juries on an attorney's standard of care and skill for purposes of fastening liability for malpractice:

> Appellant also insists that instruction number eight was wrong. The substance of this charge was that an attorney acting under the employment of his client is responsible to him only for the want of ordinary care and skill, and reasonable diligence, and that the skill required has reference to the character of the business he has undertaken to do . . . . There is no implied agreement in the relation of attorney and client . . . that the attorney will guarantee the success of his proceedings in a suit or the soundness of his opinions. He only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence, and skill would commit.

Kepler v. Jessup, 11 Ind. App. 241, 254-55, 37 N.E. 655, 659 (1894).

reasonable for another lawyer to possess and exercise in similar circumstances.[220] No Indiana decisions have been reported in which an attorney has been successfully sued for negligent preparation of a will or trust instrument. Most cases from other states have been grounded on the drafter's noncompliance with the formalities of the wills act. These derelictions typically take the form of failure to secure the requisite number of attesting witnesses, failure to adhere to the proper form of attestation,[221] or the negligent inclusion of a beneficiary under the will as an attesting witness.[222]

In California, however, malpractice suits against attorneys have been based on errors of judgment rather than simple ignorance. The best known example of this type of suit is *Lucas v. Hamm*.[223] *Lucas* was a suit brought by disappointed beneficiaries under a will which was set aside on the ground that the gift over to them contained in the will violated the Rule against Perpetuities. The California Supreme Court determined that the standard of skill which an ordinary practitioner should possess need not include the intricacies of the Rule against Perpetuities in its most obscure applications.[224] In the case of Fred Lott, the standard at issue is whether Oliver P. Morton should recognize a potentially incompetent testator and be obliged to go beyond the preparation of a will draft and advise against the execution of the proposed disinheriting will. This standard also involves the sub-issue of whether a lawyer of ordinary competence, when faced with a situation similar to that of Mr. Lott, would inquire into such matters as testamentary capacity, undue influence, and fraud.

Since the injured party is the testator and the injury occurs when the testator dies without changing the defective will, the question may arise whether a disappointed heir has standing to pursue the lawyer who drafted the will. This issue has already been answered in California. In *Lucas v. Hamm* the court decided that persons who would have taken under a will but for the attorney's errors in its preparation have standing as donee beneficiaries of the contract to employ counsel to assert the deceased client's malprac-

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[220]*See* Jones v. White, 90 Ind. 255 (1883) (attorney hired to bring replevin action; action dismissed because bond improperly drawn; attorney who does not have the skill to properly prepare form required by a plain statute is liable in damages).

[221]*See* Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958); Mickel v. Murphy, 147 Cal. App. 2d 718, 305 P.2d 993 (1957) (overruled in part on other grounds); Weintz v. Kramer, 44 La. Ann. 35, 10 So. 416 (1892); *Ex parte* Fitzpatrick, [1924] 1 D.L.R. 981, 54 Ont. L.R. 3 (1923).

[222]Woodfork v. Sanders, 248 So. 2d 419 (La. App. 1971); Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930).

[223]56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

[224]*Id.* at 592-93, 364 P.2d at 690-91, 15 Cal. Rptr. at 826-27.

tice claim.[225] The Connecticut Supreme Court reached a similar conclusion in *Licata v. Spector*,[226] a case in which disappointed beneficiaries under a will brought a malpractice action against the lawyer who negligently failed to have the required number of attesting witnesses sign the decedent's purported will. Louisiana allowed a similar malpractice suit by the beneficiaries in *Woodfork v. Sanders*,[227] a case in which the lawyer permitted a beneficiary to be a subscribing witness and thus caused the beneficiary to forfeit his legacy under the will.[228] Washington has held that the disappointed beneficiaries under a will void for an attorney's mistake had standing to prosecute the malpractice claim of their testator against the offending lawyer.[229]

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[225]*Id.* at 591, 364 P.2d at 688-89, 15 Cal. Rptr. at 824-25. The California Supreme Court overruled Buckley v. Gray, 110 Cal. 339, 42 P. 900 (1895), in which an attorney who had made a mistake in drafting a will was held not liable for negligence or for breach of contract to a beneficiary under a will who lost his legacy as a result of the lawyer's mistake. The *Buckley* case turned on the concept of privity of contract between attorney and client. In *Lucas v. Hamm*, the court pointed out that by 1961 the doctrine of privity of contract in other fields of tort law had become less rigorous than it was in 1895. *Biakanja v. Irving* had already permitted recovery by a disappointed beneficiary against a notary public who drew a will without proper attesting witnesses. In *Lucas*, the court said:

> [I]t was said that the determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury, and the policy of preventing future harm.

Id. at 588, 364 P.2d at 687, 15 Cal. Rptr. at 823. The court further noted that:

> Since defendant was authorized to practice the profession of an attorney, we must consider an additional factor . . . namely, whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession. . . . We are of the view that the extension of this liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss. . . .
>
> It follows that lack of privity between plaintiffs and defendant does not preclude plaintiffs from maintaining an action in tort against defendant.

Id. at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824.

[226]26 Conn. Supp. 378, 225 A.2d 28 (1966).

[227]248 So. 2d 419 (La. App. 1971).

[228]The actual result in *Woodfork* was that the appellate court held the will itself valid, but invalidated the gift of a "universal legacy" to the plaintiff who signed as an attesting witness. The plaintiff's petition had stated that the will itself was invalid and as a proximate result, the plaintiff lost the universal legacy. The court granted the plaintiff leave to amend his complaint for attorney malpractice on the ground that it was negligent for the defendant to include the universal legatee as an attesting witness which caused the invalidation of the gift. 248 So. 2d at 424-25.

[229]*See* Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930).

Fred Lott's case presents two sources of future malpractice litigation. First, if Lott's will is set aside for lack of capacity, undue influence, or fraud by Smith and the medium, Lott's intended beneficiary may possibly sue Morton for malpractice. Further, if the will was sustained after an expensive will contest, the beneficiaries who have suffered economic harm as a consequence may also have a claim against Morton for malpractice since any lawyer in Morton's shoes would have spotted the threat of a future contest on these facts and done something about it. Second, the intestate successors to Lott could possibly have an action for malpractice for breach of fiduciary duty to their brother.

In the past decade and a half, some lawyers have attempted to create an anticipatory record during execution ceremonies for wills which were disinheriting made by persons whose capacity was subject to inquiry. Some lawyers have videotaped will executions accompanied by lengthy on-camera interrogation of the testator on his or her property holdings, family members, and his or her reasons for executing a disinheriting will. Other lawyers have maintained a file of letters and memos describing the testator's wishes in the testator's handwriting, or have taken statements from the testator under oath before a notary in order to provide a "file" of admissible hearsay statements for an anticipated will contest. Some law professors have recommended will clauses which partially compensate disinherited relatives who do not file objections to probate.[230]

Leon Jaworski described a pro forma execution ceremony for office lawyers which included interrogation of the testator before the subscribing witnesses prior to execution. The testator had previously read the entire will before the same witnesses.[231] These precautions indicate that attorneys have given serious thought to the implications of disinheriting wills and the probability of some disappointed relative filing objections to probate.

A malpractice suit is a trial within a trial. Lott's will would have to be shown to be valid beyond a preponderance of the evidence but for the want of proper precautions taken by the lawyer during the execution ceremonies. The burden of showing that Lott was competent and was free of undue influence would rest on Smith in such a

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[230]Such clauses are usually referred to as "no contest" clauses, because in less sophisticated versions these clauses threaten to disinherit anyone who contests the will itself. A more modern type of "no contest" clause offers an inducement not to contest. The testator admonishes potential contestants that their specific legacy will be increased if the legacy is not challenged by a will contest. For further discussion of no contest clauses, *see* Jack, *No Contest Or In Terrorem Clauses In Wills—Construction and Enforcement*, 19 SW. L.J. 722 (1965); Leavitt, *Scope and Effectiveness of No Contest Clauses in Last Wills and Testaments*, 15 HASTINGS L.J. 45 (1963).

[231]Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 92-93 (1958).

suit.[232] Although Smith would have to show that the results in any will contest were not res judicata as to the issues of lack of capacity and undue influence, he would have no great problem in showing that the will contest did not raise res judicata or collateral estoppel on the filing of a legal malpractice suit against Lott's lawyer.[233]

If a will contest were filed and successfully defended by Lott's executor on Smith's behalf, the order of distribution under the probate code may be subject to Smith's objections to the size of the attorney's fee allowed on the ground that a proper exercise in file building would have obviated the need for litigation in the first place. In this case, Smith would have the judgment in the will contest showing that Lott had capacity and was free from undue influence. Smith could assert that the increased cost should not be taxed to him as residuary legatee since the objections to probate would not have been filed in the first place had Morton videotaped the execution of the will or otherwise collected evidence at the time of execution. The situation is analogous to the claim made by legatees against an executor who failed to file a federal estate and gift tax return on time but who was able to defeat assessment penalties by legal footwork for which the lawyer charged the estate additional attorney's fees. The situation also bears some resemblance to cases like *Heyer v. Flaig*[234] in which a lawyer made a single woman a perfectly valid will without informing her that on marriage the will would be void as to her spouse. The disappointed beneficiaries sued the lawyer for the amount paid to the spouse which diminished their interest under the will. Their theory of recovery was based on the principle that the lawyer knew or should have known that his client would marry and should have advised her of the effect of subsequent marriage on her will. In *Heyer*, the lawyer had prior information which would have led him to discover that his client was about to marry, had he simply followed up the leads given by his client.[235]

Finally, Lott's sisters may claim that Morton knew or should have known that Lott was incompetent and, as his fiduciary, should

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[232]For greater elaboration of the "trial within a trial" requirement, *see* Haughey, *Lawyer's Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888, 892 (1973).

[233]Collateral estoppel applies only to issues between parties in prior litigation or in privity with such parties, which could have been and in fact were litigated in a prior contest. For further explanation of this doctrine, *see* Note, *What Might Have Been Adjudicated was Adjudicated*, 9 IND. L.J. 189 (1933). *See* McIntosh v. Monroe, 232 Ind. 60, 63, 111 N.E.2d 658, 660 (1953); Richard v. Franklin Bank & Trust Co., 381 N.E.2d 115, 118 (Ind. Ct. App. 1978); *In re* Estate of Apple, 376 N.E.2d 1172, 1176 (Ind. Ct. App. 1978).

[234]70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

[235]*Id.* at 225, 449 P.2d at 162, 74 Cal. Rptr. at 226.

not have proceeded with the will. This theory implies that drafting a disinheriting will for a mentally incompetent client is a breach of fiduciary duty.

If an attorney suspects that a client is not competent to handle his or her business, the attorney may be required not to act in accordance with the client's "instructions," since the client is unable to give meaningful instruction. In this instance, Fred Lott's strange behavior over a number of years suggests that Lott may be mentally ill and perhaps incompetent. Commonly, the role of a lawyer requires the lawyer to suspend moral judgment about a client's behavior. Attorneys are conditioned to accept a client's wish as a command unless the client wants the lawyer to commit a crime or to do something which personally offends the conscience of the lawyer.[236] If a client is mentally unable to give a valid order to his lawyer, the lawyer cannot be excused from responsibility for carrying out the "wishes" of his or her client when a lay person of reasonable intellect would have questioned the client's mental capacity and sought expert advice before proceeding further. It is possible for Lott's sisters to use this argument to state a claim against Morton for malpractice or breach of fiduciary duty to his client.[237] Similar logic may allow the sisters to seek recovery of legal fees from Morton if they succeed, after filing objections to probate, in breaking Lott's will. The scope of Morton's duty as a fiduciary to his client may extend to carrying out vicarious acts of his client when the

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[236]For an extended discussion of the conceptual framework of a lawyer-client dialogue on the morality of client actions, *see* Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979).

[237]Indiana case law has held lawyers responsible for breach of fiduciary duty to their clients with respect to a lawyer's mishandling of trust funds or documents entrusted to the lawyer for safekeeping. *See, e.g., In re* Kuzman, 335 N.E.2d 210 (Ind. 1975) (disciplinary hearing for attorney who took client's corporate stock worth $200,000 as a "contingent fee"); Olds v. Hitzemann, 200 Ind. 300, 42 N.E.2d 35 (1942) (action to set aside recovery of land conveyed in trust to attorney in fraud of clients); Potter v. Daily, 200 Ind. 43, 40 N.E.2d 339 (1942) (suit on fee agreements; burden of proof on lawyer to show that legal fees were fair and reasonable); McLead v. Applegate, 127 Ind. 349, 26 N.E. 830 (1891) (alleged fraudulent commissioner's deed executed by attorney to client's spouse).

In the process of making a will, a client must entrust to his or her lawyer information about the client's assets, liabilities, and state of mind, all of which are confidential in character. A lawyer who fails to perceive that his or her client is mentally incompetent, under undue influence, or under the spell of fraud or duress, when confidential information communicated to the lawyer would lead a reasonable and prudent professional to that conclusion, may not proceed with the preparation of a disinheriting will. To do so, on the strength of modern agency theory, would be a breach of the fiduciary duty not to misuse confidential information entrusted by the client to the lawyer. RESTATEMENT (SECOND) OF AGENCY § 395 (1957).

client can no longer empower Morton to act.[238] Since an attorney's agency for his or her client is no stronger than the client's mental competency to appoint him as his agent, the risk of a challenge on this ground is not as unrealistic as it may appear on cursory examination.

After reviewing the grim potential for litigation directed against Morton and his law partner, Morton must consider the next steps to take before making Lott's will. Fred's estate will make a substantial fee for the firm. He is a client for whom Morton had done a great deal of work over the years. Despite the legal principle of testamentary freedom, ordinary citizens do not consider disinheriting wills justifiable without proof of fault on the part of the disinherited persons. Common expectations in this area parallel the continental legal doctrine of *legitime* inheritance rather than Benthamite theories concerning testamentary freedom. Fred should be told that his sisters can question his mental capacity. He should be informed that after his death they can allege that at the time his will was made Fred lacked the mental capacity or was under an insane delusion or the undue influence of some third party. Lott should be told that consulting a medium before making a will allows his sisters to accuse the medium and Smith of perpetrating fraud or undue influence to obtain his estate. Although the odds that such an attack would succeed are slim, the chance of a local jury voiding the will and requiring an expensive appeal to save it are quite strong.[239] Thus, the chance of depletion of the estate's assets through a compromise with his sisters is quite probable.

There are realistic alternatives which Fred Lott should consider. He intends to disinherit his sisters. They may eventually defeat his plan by successfully challenging his will. The first obligation Morton owes Lott is to give him correct advice on the probability that his will will be attacked and the probable consequences to the estate. Fred should understand that he has at least four options. First, he can make a disinheriting will and take his chances that the will will not be broken after his death. This alternative requires further preventive legal steps which will be discussed later. Second, Fred could reject his medium's advice and not disinherit his sisters. Ralph Smith would lose any benefits in such a case. Third, Fred could give his glass collection and other assets to Smith as an inter vivos gift. This choice would also require some preventive legal practice to avoid trouble. Finally, Fred can make a will which provides a disincentive to his sisters to challenge it. These disincentives would

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[238]*See* RESTATEMENT (SECOND) OF AGENCY §§ 379, 387, & 404A (1957) for the foundation for a claim of breach of duty on agency principles.

[239]*See* Table in Appendix A to this Article held by the publisher.

include a no-contest clause in the will tied to substantial bequests to his two sisters. Once Morton lays out these choices, Lott has a least started on a means of avoiding future litigation.

If Lott chooses to disinherit his sisters, Morton will then be obliged to tell Lott that he will need to make a record designed to refute in advance any claims that Lott lacked the mental competency to make a will. Morton should inform Lott that similar advance precautions are needed in order to ensure that his sisters are unable to upset his will on the ground that he was the victim of fraud or under Smith's undue influence.[240] Morton should explain that this record-building exercise requires that Lott have a thorough physical examination and an interview with a physician who specializes in mental disorders.

If Lott is mentally ill it is likely he will not perceive that he is ill and will strongly resist the examination.[241] Should Morton discover that Lott is unwilling to cooperate with the preventive law program, the Code of Professional Responsibility would allow him to withdraw from employment.[242] On the other hand, Morton's objective is not to drive a good client and his business out of the firm. Most likely, if Lott is not mentally ill he will see the need to make evidence of his mental competency. Morton should explain to Fred Lott that the medical records and the summary of the physician's interviews will be permanently preserved in order to discourage any later objection to his will by his sisters.

Assuming that Lott agreed to the physical and mental evaluation, Morton may proceed to design an execution ceremony which would preserve a record of Fred's disposition and his mental capacity and freedom from undue influence or fraud. Morton's normal office procedure requires a few modifications in order to meet the needs of this sort of client. The execution of the will should be recorded by conventional magnetic tape recorders or, if available, by a videotape camera and microphone on a videotape recorder.

The scenario for executing a will such as Lott's will requires a publication ceremony consisting of the following steps:

(1) Introduce Lott to the attesting witnesses on microphone.

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[240]*See* Jaworski, *supra* note 231, at 88.

[241]Mentally ill persons seldom have insight into their own condition, and will often refuse to consult a psychologist or psychiatrist. This phenomenon has been noted by psychiatrists doing evaluations of people for mental competency. For an excellent treatment of this examination process, *see* 3 B. GORDY & R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 92A.50-.51 (3d ed. 1980).

[242]*See* ABA COMMITTEE ON ETHICS AND PROFESSIOINAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, Disciplinary Rule 2-110(C)(1)(d) (1978).

(2) Have Lott read the will aloud, if he is able to do so, so that the microphone will record Lott's voice.
(3) Interrogate Lott on the nature and extent of his assets, the names and relationships of his next of kin, and his relationship to Smith.
(4) Have attesting witnesses identify themselves and their familiarity with the testator for the record.

The witnesses should be persons who have long and detailed knowledge of the testator and his habits of life. Although Indiana Code section 29-1-5-3 requires only two witnesses for formal validity,[243] three or four long-time friends of Fred Lott would make better testimony in an eventual will contest than Morton's secretary and receptionist who just stepped in for the signing of the will. Morton's objective will be to prepare in advance lay witness testimony that on the day Fred Lott executed his will he was of sound mind and disposing memory.

Following the extended publication and execution ceremonies outlined above, Lott should state to his witnesses that "This is my will and I want you to witness it for me." Lott should then sign the document in the presence of all witnesses. Each attesting witness should sign the document and also identify himself on the tape recording of the proceedings as an attesting witness who was asked by Mr. Lott to witness the signing of his will. Further, each witness should state for the record that in his opinion Lott had the ability to recall the natural objects of his bounty and the nature and extent of his property, and to formulate a rational plan for distribution of his assets at death at the time he signed his will. The recorded statements of the attesting witnesses may later be reduced to an affidavit attached to the will as is commonly done in Illinois and other states in which a self-proving will requires an affidavit that the testator possessed the elements of capacity when the will was signed.[244] If Morton wishes, he may excuse Lott and interrogate each attesting witness separately as an alternative to the above procedure.[245]

If Oliver P. Morton takes the time and trouble to build a record for his client in this situation, it will be exceedingly difficult for any disaffected family members to mount an effective challenge to Lott's will. Morton will, of course, be willing to open this extensive evidentiary file to any lawyer who represents Lott's sisters after Fred's

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[243]IND. CODE § 29-1-5-3 (Supp. 1980).

[244]ILL. REV. STAT. ch. 110 1/2, § 6-7(a) (1979). Attesting witnesses are required under the rules of formal probate to give their opinion on the mental capacity of the testator.

[245]*See* Appendix B to this Article held by the publisher for sample question list.

death. This record can be made by Morton for Lott at minimal expense.

C. Jack Fallstaff's Case: How To Plan a Will Contest

Jack Fallstaff was a local businessman. He had three children by his first wife—Richard, Henry, and Virginia. Jack's first wife died in 1977. A year later, Jack married Kathy Duncan, a thirty-four-year-old cocktail waitress at a local bar. Jack was sixty-five. Jack's pursuit of Kathy Duncan prompted both Richard and Henry Fallstaff to intervene in their father's personal life. Richard told his father that he believed that Kathy had been involved in selling drugs. Henry tried to persuade his father that having a wife half his age would make him the laughing stock of the town. The results of this confrontation were predictable. Jack stormed out vowing to cut off his children without a cent. Before Kathy Duncan had intervened in the family circle, Jack had been extremely close to his three children. He took vacations with them, visited them at college and, in general, was a model father. After meeting Kathy at an office party at his tool and die works, Jack had begun to lose interest in his children. Following the scene between Jack and his sons, the three Fallstaff children were frozen out of their father's life. After Jack's wedding, Jack refused to talk to any of them in person or on the phone. When the children called, Kathy answered and made up some excuse for Jack's refusal to talk to them. After the honeymoon, Jack told his close business associate, Roscoe Turner, that his children were selfish ingrates who were not going to receive a penny from him again. At about the same time Jack opened new joint bank accounts with his bride. He also transferred his house to himself and his spouse as tenants by the entirety.

Jack Fallstaff had had chronic high blood pressure for many years. About ten years before the events described above, Fallstaff had been hospitalized for depression at a private sanitorium. Dr. Barlow, Jack's physician, believed that Jack's mind had been affected by his wife's death in 1977. Dr. Barlow also had prescribed anticoagulants and ordered Jack to give up smoking. Fallstaff refused to reduce his two-pack-a-day cigarette habit. Barlow believed that Fallstaff was the victim of arteriosclerotic disease which had begun to affect his mind after his wife's death. Jack complained of "dizzy spells" at his plant, periods of loss of consciousness, and loss of the sense of balance.

On May 21, 1979, Fallstaff executed a revocable unfunded life insurance trust and a "pour-over will" drafted by a local firm of impeccable integrity. Fallstaff left all assets passing under his will to his trustee who was directed by the trust to pay the residue over to

Kathy Duncan Fallstaff. This was the version of the Fallstaff case given to Jacob Julian, Attorney at Law, during a two hour intake interview with Richard and Henry Fallstaff. Jack Fallstaff died from a stroke two weeks ago and his widow qualified as executor under the will the day before yesterday. The Fallstaff children want to know whether Julian will represent them in an action to break the will and the trust. Julian knows enough probate law to realize that he has five months after the will is offered for probate within which to file an action to contest the will.[246] Since Julian is a plaintiff's trial lawyer, he is not current on will contests and has never tried such a case. The Fallstaff children have convinced Julian that a manifest injustice has been worked on them by Kathy Fallstaff's importunities. Julian has assured the Fallstaff children that he will let them know within a week whether he will take their case.

Julian's notes from the interview contain six questions which he must answer before he decides whether to take the Fallstaff case:

(1) Can Fallstaff's statements to his children, his second wife, his employees, and other lay people be admitted to show both his lack of capacity and Kathy Fallstaff's undue influence over him?
(2) Can lay witnesses express their opinion on Fallstaff's mental competency?
(3) Can Fallstaff's medical history be admitted at trial and can his attending physician be called as a witness for the contestants?
(4) What kind of experts can he employ to help him prepare witnesses and to show that Fallstaff was mentally incompetent and under undue influence?
(5) What is the burden of proof on lack of capacity and undue influence?
(6) What presumptions exist in will contests which either help or harm contestants?

These problems will involve research which concentrates on lack of capacity and undue influence. However, these two areas may not be sufficient to answer the questions.

1. Relevance and Will Contest.—One of Julian's primary concerns is to find out what is relevant and material evidence[247] in a

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[246]IND. CODE § 29-1-7-17 (1976).

[247]Although the literature on will contests in the last fifteen or twenty years is rather limited, general articles in law reviews are available. *See, e.g., A Modest Proposal, supra* note 1; Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME LAW. 197 (1970); Note, *Mental Incompetence in Indiana: Standards and Types of Evidence*, 34 IND. L.J. 492 (1952); Note, *Attorney Beware—The Presumption of Undue Influence and the Attorney Beneficiary*, 47 NOTRE DAME LAW. 330 (1971).

will contest. Obviously, the issues will be framed by a complaint to contest the will alleging that the testator executed a will on a certain date and that on that date the testator lacked capacity to make a will. The complaint will further allege that the testator was under the undue influence of some beneficiary. Julian knows that the test for capacity which evolved under the *Greenwood-Baker* rule establishes that evidence on the testator's recall and his intentions are logically related to his capacity. Julian has discovered that undue influence is a form of "transference" in which the influencer substitutes his or her intentions for that of the testator. He is sure that proving undue influence requires proof that the testator was susceptible to influence and under a confidential relationship with the influencer. Although this information is helpful, Julian must still fit it in the matrix for relevance and materiality under Indiana case law. Historically, Indiana courts have used a formula for framing admissibility of evidence at trial which contains two elements. First, the proferred evidence must be logically relevant to a material fact in dispute at trial.[248] Second, in order to be material, the evidence "must tend to prove or disprove a fact which relates to an issue in the lawsuit."[249] This two-fold test has been treated in recent decisional law as a single formula for admissibility of evidence at trial.[250]

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[248]For a thorough discussion of relevant and material evidence, *see* Lake County Council v. Arredondo, 266 Ind. 318, 321, 363 N.E.2d 218, 220 (1977); State v. Lee, 227 Ind. 25, 29-30, 83 N.E.2d 778, 780 (1949).

[249]Shaw v. Shaw, 159 Ind. App. 33, 40-41, 304 N.E.2d 526, 546 (1973); Estate of Azimow v. Azimow, 141 Ind. App. 529, 531, 230 N.E.2d 450, 452 (1967).

[250]141 Ind. App. at 531, 230 N.E.2d at 451-52. The court suggested that materiality deals with "the relationship between the issues of the case and the fact which the evidence tends to prove" whereas relevance deals with "evidence [which] must logically tend to prove a material fact." *Id.* at 531, 230 N.E.2d at 452. Although Indiana courts have distinguished "materiality" and "relevance," they have been combined in the Federal Rules of Evidence. FED. R. EVID. 401 defines relevant evidence as evidence tending to prove or disprove a material fact at issue in the proceeding. FED. R. EVID. 403 allows the trial judge discretion to exclude relevant evidence if the probative value of the evidence is exceeded by prejudice to the judicial process, confusion of the issues, or the cumulative nature of the evidence. Under FED. R. EVID. 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." This schema for admitting relevant data as evidence follows current Indiana practice, although the verbal formula differs from Indiana decisional statements of the law of relevance and materiality. *See*, Walker v. State, 265 Ind. 8, 14, 349 N.E.2d 161, 166, (1976), *cert. denied*, 429 U.S. 943 (1976); Kavanagh v. Butorac, 140 Ind. App. 139, 152, 221 N.E.2d 824, 832 (1966). Much of the decision-making process of the admissibility of relevant evidence turns on the determination of whether the probative value outweighs the prejudice to the inquiry. *See* Smith v. Crouse-Hinds Co., 373 N.E.2d 923, 926 (Ind. Ct. App. 1978).

Thus, tendered evidence must tend to prove or disprove some issue at stake in the lawsuit.[251]

2. Assertive Acts and Declarations of Fallstaff About His State of Mind.—In order to judge what may be admissible in a contest over Fallstaff's will and trust, Julian needs to know what evidence Indiana courts have admitted in prior will contests. The first great class of potential evidence consists of the acts and words of Jack Fallstaff relating to his will. In prior will contests, the Indiana courts have admitted eyewitness testimony by lay witnesses detailing what a testator said and did at a time not too remote from the execution of the will.[252] These witnesses have testified to two kinds of acts of the testator. First, the eyewitnesses have reported non-assertive acts of the testator, which are usually held not to be hearsay. The type of non-assertive conduct generally admitted includes physical manifestations of mental illness such as blackouts, forgetfulness, confusion, and bizarre behavior. Indiana courts treat assertive acts and words of a testator differently than non-assertive acts. Generally, non-assertive conduct of the testator may be admitted on the issues of lack of capacity, undue influence, and fraud without distinction.[253] However, assertive acts and words of the testator evidencing his state of mind may not be admissible.

The admission of assertive acts such as a former will and words of a testator has been sharply limited by the Indiana courts to the issue of the testator's mental competency. This has been done under the rationale that such acts and statements are hearsay and admissible only under the state of mind exception to the hearsay rule.[254] Indiana courts have refused to admit these acts and words of the

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[251]141 Ind. App. at 531, 230 N.E.2d at 451-52.

[252]The justification for eyewitness testimony relating to acts and conduct of the testator prior to death, within a reasonable time before the act of will execution, has always been the logical relationship between specific aberrant acts and testamentary capacity. *See, e.g.*, Crane v. Hensler, 196 Ind. 341, 353, 146 N.E. 577, 581 (1925); Jarrett v. Ellis, 193 Ind. 687, 690-91, 141 N.E. 627, 628 (1923); Emry v. Beaver, 192 Ind. 471, 473, 137 N.E. 55, 55-56 (1922) (evidence otherwise relevant excluded by Dead Man Act). The admissibility of acts and conduct of the testator depends on the issue for which it was originally offered.

[253]*See* Ramseyer v. Dennis, 187 Ind. 420, 116 N.E. 417 (1917); Patrick v. Ulmer, 144 Ind. 25, 42 N.E. 1099 (1895) (delerium); Bundy v. McKnight, 48 Ind. 502, 513 (1874) (bizarre and strange acts of the testator at the time when the will was made).

[254]*See* Emry v. Beaver, 192 Ind. 471, 473, 137 N.E. 55, 55-56 (1922) (declarations of testator not made at time of will admissible to show soundness of mind); Robbins v. Fugit, 189 Ind. 165, 167-68, 126 N.E. 321, 322 (1920) (testator's former will and statements that family members had assaulted him admissible to show unsound mind, but not to show undue influence); Oilar v. Oilar, 188 Ind. 125, 129, 120 N.E. 705, 706 (1918) (testator's statement of intent admissible to show his mental condition); Ditton v. Hart, 175 Ind. 181, 189, 93 N.E. 961, 965 (1911) (letters and other wills of testator admissible to show capacity but not to show undue influence).

testator to show that the testator was under undue influence.[255] In most instances, the acts and words of the testator concerning the making of a will come into the record with a limiting instruction to the jury not to consider the evidence on the issue of undue influence.[256]

Julian considered the impact of Fallstaff's declarations to his employees about his children. From Julian's reading of the theoretical articles on lack of capacity, he sensed that these declarations may be evidence of an "insane delusion" and also circumstantial evidence that Kathy Duncan had exercised undue influence over Jack Fallstaff. Julian would like to be sure that these statements would be admissible in any trial of the Fallstaff case. His reflections on Indiana case law showed that Fallstaff's declarations will be admissible to show that he suffered from an insane delusion at the time he made his will but inadmissible on the issue of undue influence.

Julian also suspected that the Indiana Dead Man Act would bar any of Fallstaff's statements of mental condition made to his children if the statements also contained some future promise of

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[255]The early case of Runkle v. Gates, 11 Ind. 95 (1858) began this process of limiting the admission of declarations of the testator to the issue of capacity. The court excluded the statement of the testator that he was glad his will had been burned when the statement was offered into evidence on the issue of whether the testator had properly revoked his will. The court further interpreted T. JARMAN, WILLS to mean that declarations of the testator that he had revoked a will when in fact the will had not been revoked pursuant to the manner described in the Wills Act of 1837 were excluded by the hearsay rule. 11 Ind. at 99-100 (citing T. JARMAN, WILLS ch. 7, § 2 (2d ed. J.C. Perkins 1849)). Hayes v. West, 37 Ind. 21, 24-25 (1871) added to the confusion by citing 1 I. REDFIELD, THE LAW OF WILLS ch. 10, § 39 (4th ed. 1866), in support of excluding as hearsay declarations of the testator that he had been misled, seduced, or otherwise intimidated into making a will. Redfield indicated, with a great deal of case law support, that declarations of the testator exhibiting his state of mind at the time of execution were admissible and relevant to the issues of capacity, undue influence, and fraud. I. REDFIELD at 548-55. The distinction on the issues were not carried over by later Indiana case law. The decisions which excluded pre-testamentary declarations of a testator on the issue of undue influence should probably be overruled.

[256]The topic is exhaustively reviewed in 6 J. WIGMORE, THE LAW OF EVIDENCE §§ 1734-40 (J. Chadbourne rev. 1976). Wigmore concluded that declarations by a testator which reflected the testator's state of mind should be admissible:

> In surveying these . . . distinctions, together with those already noticed for other kinds of post-testamentary declarations . . . one is impressed with the practical futility of attempting to enforce them strictly. It is doubtful if often they amount to anything more than logical quibbles which a Supreme Court may lay hold of for ordering a new trial where justice on the whole seems to demand it. It would seem more sensible to listen to *all the utterances* of a testator, without discrimination as to admissibility, and then to leave them to the jury with careful instruction how to use them. The doctrine of multiple admissibility . . . almost always would justify this.

Id. § 1738, at 188.

benefit to them. However, his investigations so far have turned up only negative, hostile, and threatening statements made by Fallstaff about his testamentary plans for his children. Consequently, Julian feels safe that an incompetency objection would not be sustained against a recital of Fallstaff's conduct and statements occurring before and after he made his will. Such statements will be admissible on the issue of lack of capacity and all but his hearsay declarations of intent to disinherit his children would be admissible on the issue of undue influence.

3. Lay Opinion Witnesses.—There are several sources of lay opinion about Fallstaff's mental state available to both sides in this case. First, the witnesses who witnessed the will have special status, at least in the older cases, as witnesses with an opportunity to observe the testator and to draw an inference concerning his mental capacity from their status as statutory witnesses to the will of Jack Fallstaff.[257] Jack's children and Jack's widow have observed the deceased testator over an extended period of time and so will have an opportunity to relate their opinion of Jack's mental agility when he was last seen by them. A cursory search of Indiana case law revealed to Julian that opinion evidence of this kind falls within a well-recognized exception to the prohibition on lay opinions and is allowable on a foundation of first-hand knowledge on the part of the opinion witness of the testator's acts and conduct.[258] Julian plans to

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[257]Opinions given by lay witnesses on the mental competency of an actor, based on first-hand observation, are admissible in all courts. 7 J. WIGMORE, THE LAW OF EVIDENCE § 1933 (J. Chadbourne rev. 1978). Wigmore also noted that attesting witnesses to wills are uniformly permitted to give their opinions on the mental capacity of the testator. *Id.* § 1936. Wigmore cited Both v. Nelson, 31 Ill. 2d 511, 202 N.E.2d 494 (1964) as authority for the position that a court which fails to permit the attesting witnesses to a will to give their opinions of the testator's mental state at the time of execution has committed reversible error. Although Indiana has no case as strong as *Both*, it is likely that the opinions of attesting witnesses to a will or to trust instruments would be admissible and exclusion would be reversible error as well.

[258]McReynolds v. Smith, 172 Ind. 336, 348-49, 86 N.E. 1009, 1013-14 (1909) (instruction to the jury concerning use of lay opinion testimony approved); Westfall v. Wait, 165 Ind. 353, 357-58, 73 N.E. 1089, 1090 (1905) (cross-examinations of lay opinion witnesses by lawyer for proponent may be based on specific acts or conduct of the testator); Brackney v. Fogle, 156 Ind. 535, 536-37, 60 N.E. 303, 303 (1901) (lay witness may not give opinion of ultimate issue of fact of testamentary capacity); Bower v. Bower, 142 Ind. 194, 199-200, 41 N.E. 523, 524-25 (1895) (lay witness' opinion on mental capacity must be preceded by foundation showing the nature and extent of the witness' first-hand observation of the testator); Staser v. Hogan, 120 Ind. 207, 214-20, 21 N.E. 911, 913-15 (1889) (numerous lay opinions on testator's mental state given on relation of first-hand observation of testator); Lamb v. Lamb, 105 Ind. 456, 458-59, 5 N.E. 171, 172 (1886) (no error to permit proponent to give personal opinion on testator's capacity based on first-hand observations); Irwin Union Bank & Trust Co. v. Springer, 137 Ind. App. 293, 205 N.E.2d 562 (1965).

interrogate those eyewitnesses to Fallstaff's increasingly erratic behavior using a check list for evaluating lay opinions on capacity.[259] Julian anticipates that these witnesses will also have an opinion on whether or not Jack Fallstaff was susceptible to undue influence by his second wife. No Indiana case has dealt with the issue of the admissibility of lay opinion concerning a testator's susceptibility to undue influence. The very few cases reported in other states, however, have generally excluded such lay testimony.[260]

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[259]The scenario for preparation of lay opinion witnesses would be as follows:

1. How long did you know Jack Fallstaff before his death?
2. Did you notice any change in his behavior within a year or two of his death?
3. Describe the changes you noticed.
4. Can you give specific instances, fixing the date, time and place, as well as you can, of instances of forgetfulness, "black outs", or other behavior which struck you as abnormal, unusual or bizarre relating to Jack Fallstaff?
5. How many times did you meet Fallstaff within a year of his death?
6. On the last date you saw Jack Fallstaff, did you have an impression that he was able to comprehend his surroundings?
7. On that last date, did you have any impression as to whether or not he could manage his business for himself without outside help?
8. Would Jack Fallstaff have been able to recognize his children, and their relationship to him the last time you saw him before his death?
9. Would you say that Fallstaff, on that date, knew in a general way what he owned and its approximate worth?
10. Do you think that Fallstaff had, on that date, the mental ability to make a rational plan for disposing of his property at his death, taking into account his children's affection for him, their needs and the needs of his second wife, Kathy, and the nature and worth of his property?
11. Can you explain the reasons behind your opinions?

Trial lawyers will note that the form of these questions may be objectionable if actual examination in court were conducted this way. However, the object of this preparation program is to prepare the attorney and the witnesses for more structured testimony on capacity at trial.

[260]The admissibility of lay opinion on the testator's susceptibility to influence has been litigated in seven states. Arkansas excluded lay opinion on susceptibility to influence in Smith v. Boswell, 93 Ark. 66, 124 S.W. 264 (1909). Georgia may allow such opinion evidence, although the authority is very old and consists of syllabus statements rather than judicial opinions. *See* Thompson v. Ammons, 160 Ga. 886, 129 S.E. 539 (1925) (syllabus only); Penn v. Thurman, 144 Ga. 67, 86 S.E. 233 (1915) (syllabus only); Gordon v. Gilmer, 141 Ga. 347, 80 S.E. 1007 (1914) (syllabus only); Slaughter v. Heath, 127 Ga. 747, 57 S.E. 69 (1907) (syllabus only). Illinois has rejected the admission of lay opinion on susceptibility to influence. Teter v. Spooner, 279 Ill. 39, 116 N.E. 673 (1917). Iowa has excluded such opinion evidence as incompetent and immaterial. *In re* Goldthorp's Estate, 94 Iowa 336, 62 N.W. 845 (1895). Michigan excluded such opinion without explanation as "calling for a conclusion" in O'Connor v. Madison, 98 Mich. 183, 57 N.W. 105 (1893). Pennsylvania excluded opinions on susceptibility to undue influence in the transfer of a deed in the ancient case of Dean v. Fuller, 40 Pa. 474, 478 (1861). This result has not been extended to wills in general, though. Finally, Texas has allowed lay opinion on susceptibility to undue influence in a case dealing with an inter vivos transfer, on a showing that the witness had familiarity with the

Finally, Julian questioned whether an opinion by one of the Fallstaff children constituted a "claim against the estate" of Fallstaff and was thus barred by the Dead Man Act. Fortunately for Julian, Indiana has already decided this issue in his favor and he can be sure that opinion evidence by a party having a claim to set aside a will which goes to the capacity of the testator who made the will can be taken as evidence in a will contest.[261]

Naturally, if Julian may call the Fallstaff children as lay opinion witnesses, Kathy Duncan Fallstaff may also give her opinion. In wondering what weight the jury will give to the lay opinions, Julian must also consider the effect of any expert testimony, especially that of Dr. Barlow.

4. Expert Opinion in Will Contests.—Dr. Barlow, Fallstaff's treating physician, undoubtedly took an extensive history of his patient, including his bouts with depression which may have been psychotic. However, all this information, although admissible as an exception to the hearsay rule, is privileged. Indiana jealously guards its statutory physician-patient privilege in will contests. In *Pence v. Myers*,[262] the Indiana Supreme Court held that admission of an abstract of a physician's death certificate showing the testator's cause of death was reversible error. The court stated that:

> It is well established that in a will contest, a physician, attendant on a testator, at the time of his death, should not be permitted to give testimony tending to strike down the will as to the condition of the testator's mind or as to the disease from which he suffered, the cause or duration of his illness and the cause of his death . . . .[263]

The contestants cited *Kern v. Kern*[264] in which the supreme court held that the attorney-client privilege between the deceased testator and his lawyer did not apply to statements made by the testator which were relevant to the testator's testamentary capacity and freedom from undue influence.[265] By analogy, relevant statements of the testator to his attending physician should be admissible despite the statutory privilege. However, *Kern* was followed by *Brackney v. Fogle*,[266] in which the contestants offered testimony by

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grantor's state of mind. Koppe v. Koppe, 57 Tex. Civ. App. 204, 122 S.W. 68 (1909). In all probability, Indiana's courts would follow the majority rule excluding such opinion evidence on the issue of susceptibility to undue influence.

[261]Lamb v. Lamb, 105 Ind. 456, 458-59, 5 N.E. 171, 172 (1886).

[262]180 Ind. 282, 101 N.E. 716 (1913).

[263]*Id.* at 286, 101 N.E. at 717.

[264]154 Ind. 29, 55 N.E. 1004 (1900).

[265]*Id.* at 35, 55 N.E. at 1006.

[266]156 Ind. 535, 60 N.E. 303 (1901).

the testator's attending physician, yet the testimony was barred on a claim that the communications were privileged. The contestant's lawyer argued to the jury that the proponent's failure to waive the privilege showed that the proponent had something to hide.[267] The *Brackney* court held the argument improper and reversed the trial court's judgment for the contestant.[268]

In recent years the holding in *Pence v. Myers* had been eroded by such cases as *Estate of Beck v. Campbell*,[269] in which the appellate court held that a physician may testify as to dates of treatment for a patient despite the physician-patient privilege,[270] and *Robertson v. State*,[271] in which the appellate court determined that an attending physician, barred by the privilege statute from giving his actual diagnosis and the actual history of his patient in court without the patient's consent, could be called to testify in court to a hypothetical question involving the substance of the prohibited data taken from another non-confidential source.[272] The prohibited data happened to be the level of intoxication of his patient on a particular day and its effect, in his opinion, on his patient's behavior.[273]

In the Fallstaff case, Dr. Barlow's findings on examination of Fallstaff, his treatment notes, and his case history file are all privileged matter. Fallstaff's second wife, as executor, has the physician-patient privilege rights of Fallstaff which she may choose not to waive in this case because of the damaging contents of Dr. Barlow's case history file on Fallstaff. Rather than try for a reversal of *Pence v. Myers*, Julian should amass sufficient detail to put into the record so that Dr. Barlow can be called as a medical expert and respond to hypothetical questions about Jack's mental competency and his susceptibility to undue influence. Julian's data will consist of the lay witness reports concerning what they saw and heard from Fallstaff, nursing notes from the sanitorium in which Fallstaff was a patient, and prescription drug orders, if available, from Fallstaff's druggist. Julian must assume that Kathy Fallstaff will not waive the privilege and allow Dr. Barlow to give his own observations of Fallstaff.

The nursing notes from the sanitorium, interestingly enough, are not privileged matter even though they contain such items as the physician's medication orders, restraint orders from the attending physician, and summaries dictated into the records of the in-

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[267]*Id.* at 537, 60 N.E. at 303.

[268]*Id.* at 538-39, 60 N.E. at 304-05.

[269]143 Ind. App. 291, 240 N.E.2d 88 (1968).

[270]*Id.* at 296, 240 N.E.2d at 92.

[271]155 Ind. App. 114, 291 N.E.2d 708 (1973).

[272]*Id.* at 118-19, 291 N.E.2d at 711-12.

[273]*Id.* at 118, 291 N.E.2d at 710.

stitution. Indiana, illogically enough, has a case which holds that matter communicated to a nurse by a patient in a hospital is not privileged under the physician-patient privilege statute.[274] Consequently, any emergency room logs, admission summaries, or other records taken down when Fallstaff was admitted to the emergency room after his 1979 fatal stroke are also admissible under the business records exception to the hearsay rule. All this data will be presented, via the hypothetical question, to Dr. Barlow who will then give his opinion on the testamentary capacity and susceptibility to undue influence of the hypothetical testator.

Julian considered whether he should retain a clinical psychologist to buttress the case for partial insanity or lack of capacity. Clinical psychologists have for years been considered experts in other jurisdictions. Since 1974, these individuals have been held experts on mental disease in Indiana.[275] A psychiatrist is a physician who has been certified as a specialist in psychiatric medicine and is licensed to prescribe medicine. Clinical psychologists, however, do not prescribe medicine but are certified to treat people for mental disorders by non-medicinal psychotherapeutic techniques. For a reasonable fee, Julian may secure a professor of clinical psychology to act as consultant in the Fallstaff case.[276] He or she could tell Julian whether Fallstaff was delusional when he made his will which disinherited his children. The consultant can provide Julian with insight into Fallstaff's personality structure and its interplay with his disapproving children. This will assist Julian in designing better questions for his lay witnesses and better hypothetical questions for his expert witnesses. A clinical psychologist can provide, for relatively low prices, an expert opinion on

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[274]General Accident, Fire & Life Assurance Co. v. Tibbs, 102 Ind. App. 262, 2 N.E.2d 229 (1936).

[275]*See* Indianapolis Union Ry. v. Walker, 162 Ind. App. 166, 318 N.E.2d 578 (1974).

[276]The use of psychiatrists in will contests was suggested by Prof. John J. Broderick in Broderick, *The Role of the Psychiatrist and Psychiatric Testimony in Civil and Criminal Trials*, 35 NOTRE DAME LAW. 508, 511 (1960), following the lead of Hulbert, *Psychiatric Testimony in Probate Proceedings*, 2 L. & COMTEMP. PROB. 448 (1935). In 1964, George Lassen, a clinical psychologist holding the office of Court Psychologist in Baltimore, Maryland, advocated the use of clinical psychologists in criminal cases as experts on mental problems, including undue influence. *See* Lassen, *The Psychologist as An Expert Witness in Assessing Mental Disease or Defect*, 50 A.B.A.J. 239 (1964). In 1968, Dr. Eugene E. Levitt of Indiana University Medical Center, Indianapolis, indicated in an address to the Indiana Judicial Conference just how useful clinical psychologists might be in settling matters in which the competency of a person must be determined by hypothesis or by testing results. *See* Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L.J. 82 (1969). The authority for using psychologists as expert witnesses grows in all other states in the United States. It ought not be a matter for great concern in Indiana trial courts at this time.

Fallstaff's mental competency and assist in planning the case. He or she may also appear as a second expert witness for the contestant.

5. Burden of Proof and Presumptions in a Will Contest.—Since fraudulent inducement to make a will played no part in the Fallstaff case, Julian hypothesizes that under Trial Rule 11 he is restricted ethically to a two paragraph complaint. In the first paragraph, Julian will set up a claim on the issue of lack of capacity. The second paragraph will be drafted to state a claim to set aside the will on the grounds of undue influence. In contesting the will on grounds of lack of capacity, Julian has two alternative grounds to allege. First, he should allege that Fallstaff, on May 21, 1979, was unable to know the natural objects of his bounty, unable to know the nature and extent of his property, and unable to make a rational plan for disposition. Second, Julian should allege that Fallstaff, on May 21, 1979, was suffering from an insane delusion that his children did not love him and as a proximte result he disinherited them. The required burden of proof on each of the elements of the case will be by a preponderance of the evidence.[277]

The second paragraph of the complaint should allege that on May 2, 1979 Jack Fallstaff was susceptible to undue influence. It should assert that Jack Fallstaff had a confidential relationship with Kathy Fallstaff, his second wife, which was used to importune Jack Fallstaff to change his testamentary plans to the benefit of Kathy Fallstaff, but at the expense of the Fallstaff children. The complaint should conclude that this change of beneficiaries was unconscionable.[278] These elements in *In re Faulk's Will* must also be proven by a preponderance of the evidence. Had there been any reasonable basis to assert that Kathy Fallstaff procured the May 1979 will by fraudulent representations, Julian would have been required to allege the specific words or acts constituting the representation, *scienter*, and an unconscionable change of testamentary plans as a result. His prayer for relief would then be confined to a constructive trust rather than an avoidance of the will. This allegation would also require proof by a preponderance of the evidence.[279]

Generally, Indiana courts hold to a Thayerian doctrine of evidentiary presumptions. Such presumptions are considered "rebuttable" or likely to disappear when the party opposing the presumption offers any contrary evidence.[280] Indiana recognizes that there is a presumption that a will, duly executed according to the statute, is

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[277]IND. CODE § 29-1-7-20 (1976) and the cases cited at note 15 *supra*.

[278]*See* cases cited at notes 155-159 *supra*.

[279]IND. CODE § 29-1-7-20 (1976).

[280]Such a view of presumptions was adopted by the Federal Rules of Evidence. *See* FED. R. EVID. 301 and the official comments thereto.

free of undue influence and was executed by a person having testamentary capacity.[281] Indiana also adheres to the presumption that once a person's apparently permanent mental incapacity is established by judicial declaration or expert testimony, the incapacity continues until credible evidence is offered to show that it has ended.[282] This web of presumptive law means that Kathy Fallstaff enjoys a presumption, arising from proof of due execution according to the form prescribed in the Probate Code, that the will in her favor is valid. This means that she has no burden of proof to establish the mental capacity of Fallstaff. Further, the Indiana courts treat this presumption as one which does not disappear when contrary evidence is offered. Therefore, the will contest will go to the jury even if the proponent offers no evidence showing that Fallstaff was of sound mind and free of undue influence when he made his will.

The presumption of continuing mental incapacity may be useful to Julian if he can establish that at some time prior to May 21, 1979, Jack Fallstaff was incompetent. Since Fallstaff's commitment to the sanitorium for depression was probably not judically ordered, Julian must rely on expert testimony alone for aid in this instance.

VI. Conclusion

In the mid-nineteenth century Indiana adopted the *Greenwood-Baker* rule for testamentary capacity. The *Greenwood-Baker* rule was derived from eighteenth century English attempts to formulate legal guidelines for avoiding the wills of senile people. The rule states that in order to be able to make a will a testator must: (a) know the natural objects of his bounty; (b) know the nature and extent of his property; and (c) while keeping the two in mind, make a rational plan for disposition of the testator's assets after death. This low-level threshold test for capacity to make a will was qualified by the rule of *Dew v. Clark*, or the "insane delusion" rule, which states that a testator who otherwise meets the threshold test for capacity under the *Greenwood-Baker* rule may lack capacity if the testator's will is the product of a fixed and immediate belief about some natural object of the testator's bounty which is unsupported by rational evidence and which no amount of rational persuasion can overcome.

During the same decade that the *Greenwood-Baker* rule was adopted, Indiana's highest court decided that undue influence over a

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[281]Kaiser v. Happel, 219 Ind. 28, 30, 36 N.E.2d 784, 785 (1941); Young v. Miller, 145 Ind. 652, 44 N.E. 757 (1896).

[282]Branstrator v. Crow, 162 Ind. 362, 69 N.E. 668 (1904); Stumph v. Miller, 142 Ind. 442, 41 N.E. 812 (1895).

testator constituted distinct grounds for relief against a testator's will. It was not a tort claim to set aside a will on account of fraudulent inducement. Rather, undue influence was a claim founded on the replacement of the testator's free will by the will of another. In order to set aside a will as the product of undue influence, the contestant has to prove that the testator was susceptible to undue influence by others and enjoyed a confidential relationship with an influencer who then used that relationship to importune the testator for an unconscionable change of testamentary disposition. The Indiana courts dealing with undue influence have experienced difficulty in dealing with the various classes of rogues involved in undue influence. Generally, the courts favor the importuning of second spouses, children, and collaterals, and disfavor the importuning of lawyers and doctors.

Fraudulent procurement of a will is a third distinct claim against the validity of a will. It is a common law tort action and is independent of the strange Indiana evidentiary rule which bars the admission of conversations of the testator on the issue of undue influence but not on the issue of capacity. A fraud claim is a potent tactical weapon for contestants to counter balance the bias in favor of proponents which is evident in the appellate judicial treatment of will contests in Indiana.

The two fictitious episodes in this essay illustrate the operation of the substantive law in will contests. The case of Fred Lott presented realistic situations which occur in law practice involving decisions of testamentary capacity, undue influence, and fraud. The Lott case dealt with the foreseeable risks which may arise in a later will contest and an attorney's duty to advise his client on the consequences of legitimate and of spurious litigation directed at the estate by disappointed relatives. The main point of the Lott case was to raise the consciousness of office practitioners of the potential for will contests. It also indicated the potential for malpractice claims based on a lawyer's failure to detect the potential for a future contest and to take preventive law measures to ensure that his client's interest is adequately protected by pre-death planning and data-gathering measures.

The Fallstaff case poses a problem for plaintiff's lawyers who are asked to take on a will contest for disappointed relatives of the testator. First, will contests are particularly tortuous pieces of litigation with internal ground rules which differ sufficiently from ordinary litigation to make them more difficult to prosecute. Second, since will contests occur much less frequently than other kinds of litigation, the average trial lawyer's level of experience in such matters will likely be low. Third, the theory of recovery in will contests, like products liability cases, must be built around the opinion

evidence of an expert witness. Finally, orthodox ways of appraising one's eventual success or failure in a will contest are non-existent. Fallstaff's case illustrated how a trial lawyer can evaluate evidence, make a proof chart, and organize data for trial. The primary thrust of this Article is to show how the problems of testamentary capacity, undue influence, and fraud lurk behind everyday practice situations, ready to devour the lawyer who is not sufficiently aware of the dangers of will contests.

In Indiana, as in most states, the wills of persons who are senile or mentally ill are admitted to probate over strong evidence that the testator lacked any conception of what he was doing during the process of formulating a testamentary plan. Jury verdicts for contestants in will contests are regularly overturned by appellate courts on hyper-technical grounds. This nationwide pattern suggests that the judiciary frowns on successful will contests. Indiana, like most other American states, is committed to the concept of testamentary freedom. This commitment is limited only by the doctrines of lack of capacity, undue influence and fraud. Testamentary freedom is an abstract principle of law which seems to be wholly judge-made and largely unexamined by lawyers, law professors, and lay people alike. It may be judicially noticed that, in other jurisdictions, *legitime* heirship and community property temper testamentary freedom, and ensure that the relatives of a deceased person cannot be disinherited save for grave causes. This Article is an attempt to induce the legal profession to undertake a serious study of the social, economic, and cultural impact of disinheriting wills. Without such a study, our judiciary will continue to flounder about enforcing an abstract concept of unfettered discretion in will making. If the social, cultural, and economic harm of disinheriting wills were better known, it is doubtful that the judiciary would be so willing to sustain the abstract principle of testamentary freedom.

Comment

Shideler v. Dwyer: The Beginning of Protective Legal Malpractice Actions

ROBERT D. MACGILL*

I. INTRODUCTION

On March 3, 1981, the Indiana Supreme Court handed down its decision in *Shideler v. Dwyer*.[1] *Shideler* presented two issues to the court. First, the court decided which statute of limitations is applicable to legal malpractice actions.[2] Second, it determined when a cause of action accrues for legal malpractice.[3] The court's decision on both of these issues will have far-reaching effects, not only upon practicing attorneys, but also upon those persons injured by legal malpractice.

One result of the court's decision is that legal malpractice actions will be governed by the relatively short two year statute of limitations provided by the first clause of Indiana Code section 34-1-2-2. The most striking result of the court's opinion in *Shideler*, however, is that a cause of action for legal malpractice accrues, and the statute of limitations begins to run, before a determination is made that the attorney's services failed to have their intended effect. This early accrual forces the attorney representing the party potentially aggrieved to toll the statute of limitations on the legal malpractice claim by filing a protective action for legal malpractice before other pending litigation determines whether an attorney's services had their intended effect.

These protective actions mandated by the *Shideler* decision will have two particularly bothersome effects. If a protective action is filed while the attorney's work is being reviewed in other litigation to determine if it had its intended effect, the party aggrieved by the alleged act of legal malpractice will be required to simultaneously *defend* the validity of the attorney's work in one action and to *attack* it in a separate malpractice action. Another unfortunate conseuqence is that such a protective action may needlessly diminish an attorney's professional reputation. This particular harm becomes especially apparent if one evisions a situation in which a significant

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[1]417 N.E.2d 281 (Ind. 1981), *vacating and remanding*, 386 N.E.2d 1211 (Ind. Ct. App. 1979).

[2]*See* text accompanying notes 12-52 *infra*.

[3]*See* text accompanying notes 53-113 *infra*.

amount of publicity accompanies the protective legal malpractice action, and the attorney's work is eventually judged to have had its intended effect.

Perhaps the Indiana Supreme Court in deciding *Shideler* did not foresee the potential for this sequence of events. However, the decision will drastically affect any lawyer advising a client on how to proceed when he *might* have been harmed by the legal services rendered by another attorney, as well as any lawyer against whom a cause of action for legal malpractice is filed.

II. Factual Circumstances of *Shideler*

Shideler v. Dwyer[4] involved an interlocutory appeal by Shirley A. Shideler and Barnes, Hickam, Pantzer & Boyd [Barnes, Hickam] of an order entered by the trial court which denied their motion for summary judgment in a legal malpractice action brought by Mary Catherine Dwyer. The grounds for the defendants' motion were that Dwyer's action for legal malpractice was barred by the application of the statute of limitations periods set forth in Indiana Code section 34-4-19-1 and the first clause of section 34-1-2-2. Dwyer's cause of action sought damages from the defendants for legal malpractice based on professional services which were rendered or should have been rendered in 1973 pursuant to the preparation of the will of Robert P. Moore. Moore's will was executed on October 8, 1973 and was admitted to probate on December 21, 1973, one week after he died. The controversy in *Shideler* stemmed from the following provision of the will:

> "Clause 7.1(c); *Provision for Mary Catherine Dwyer.* I specifically direct Dominie L. Angelicchio to use his best efforts as long as he owns any shares of stock of Moorfeed Corporation, to cause the Corporation to continue the employment of Mary Catherine Dwyer until her retirement or her other service termination date, then from and after such date and until her death, or the death of Dominie L. Angelicchio prior thereto, Dominie L. Angelicchio shall cause the Corporation to pay Mary Catherine Dwyer as a retirement benefit the sum of $500 per month."[5]

The events that followed the testator's death were succinctly summarized by the Indiana Court of Appeals:

> "Dwyer decided to terminate her employment in the fall of 1974. Her attorney discussed Clause 7.1(c) in Moore's Will with Shideler, who was then serving as attorney for Moore's

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[4]417 N.E.2d 281 (Ind. 1981).

[5]*Id.* at 284 (quoting 386 N.E.2d at 1212-13 (emphasis in original)).

estate. The estate and Angelicchio took the position that Dwyer would have to meet the qualifications set forth in the profit-sharing plan of Moorfeed Corporation before she would be eligible for any benefits provided by Clause 7.1(c) of Moore's Will. Nevertheless, Dwyer submitted her resignation effective October 31, 1974.

When Dwyer did not receive a payment for November 1974, she filed her petition on November 13, 1974, asking the Marion County Probate Court to construe the Will of Robert P. Moore. The Probate Court entered its decree on June 30, 1975, and held that Clause 7.1(c) of Moore's Will was

> '. . . null and void and of no effect because of its impossibility of performance. The language of said Clause 7.1(c) is merely precatory language. Such Clause 7.1(c) is directed to a corporation and a stockholder of such corporation cannot cause the corporation to perform the acts set out in said clause.'

Dwyer filed her action against Shideler and Barnes, Hickam on June 29, 1977. She alleged, *inter alia*, that Robert P. Moore had intended for Dwyer to receive $500 per month in addition to other retirement benefits, and that Shideler and Barnes, Hickam, who prepared the Will for Moore, knew or should have known that Clause 7.1(c) would be held void.

Shideler and Barnes, Hickam ultimately filed their motion for summary judgment, which the trial court denied."[6]

The defendants' interlocutory appeal of the denial of their motion for summary judgment presented two issues to the Indiana Court of Appeals and to the Indiana Supreme Court. First, which statute of limitations will apply to actions for legal malpractice? Second, when does an action for legal malpractice accrue, causing the statute of limitations to begin running?

The Indiana Court of Appeals affirmed the trial court's denial of Shideler's motion for summary judgment.[7] The court noted that the date upon which a cause of action accrues "is generally a question of fact for the jury."[8] Additionally, the court concluded that a factual issue existed as to the proximate cause of the harm allegedly suffered by Dwyer.[9] Consequently, the Indiana Court of Appeals

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[6]417 N.E.2d at 284 (quoting 386 N.E.2d at 1213).

[7]386 N.E.2d at 1217.

[8]*Id.* (citing Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928); Winston v. Kirkpatrick, 110 Ind. App. 183, 37 N.E.2d 18 (1941)).

[9]386 N.E.2d at 1217. The court noted at footnote 4:

Each of the [defendants'] arguments . . . assumes that the denial of payments in 1974 was proximately caused by the overt act of drafting a Will with a

remanded the interlocutory appeal of Shideler and Barnes, Hickam to the trial court for further proceedings.[10] Shideler and Barnes, Hickam petitioned the Indiana Supreme Court to transfer their cause from the First District of the Indiana Court of Appeals. Their petition for transfer, presenting the same two issues—which statute of limitations applies and when does it begin running—was granted.[11]

III. The Statute of Limitations for Legal Malpractice Actions

Prior to *Shideler*, it was unclear which Indiana statute of limitations applied to legal malpractice actions.[12] The supreme court removed this uncertainty by first holding that Indiana Code section 34-4-19-1,[13] which provides that medical malpractice actions must be brought within two years of the negligent act or omission, does not apply to legal malpractice actions.[14] The court then decided, when presented with a five-count complaint alleging, *inter alia*, breach of contract, fraud, and negligence, that the nature or substance of the complaint sounded in tort.[15] Therefore, Indiana Code section 34-1-2-2,[16] which provides that an action for injury to personal property is timely if brought within two years of the accrual of action,

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void provision. The record does not support this basic premise; at best, a genuine issue of material fact exists and makes summary judgment improper. Because we do not accept this basic premise, we deem it unnecessary to respond to each of the arguments presented.

Id. n.4.

[10]*Id.* at 1217.

[11]417 N.E.2d at 283.

[12]*See* Jackson, *Professional Responsibility and Liability, 1980 Survey of Recent Developments in Indiana Law*, 14 Ind. L. Rev. 433, 455-57 (1981). *See also* Annot., 2 A.L.R.4th 284 (1980) for a reprise of state and federal cases discussing what statutes of limitation govern actions against an attorney for malpractice. *See generally* R. Mallen & V. Levit, Legal Malpractice §§ 191-98 (1977 & Supp. 1979).

[13]Ind. Code § 34-4-19-1 (1976) provides in part:

No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of.

[14]417 N.E.2d at 283.

[15]*Id.* at 288-89.

[16]Ind. Code § 34-1-2-2 (1976) provides in pertinent part:

The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards.

First. For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years. . . .

was the applicable statute of limitations, and not section 34-1-2-1,[17] which bars an action for breach of contract if not filed within six years after accrual. The decision of these issues resolved a split which had developed between districts of the Indiana Court of Appeals.

A. *Section 34-4-19-1 Limited to Medical Malpractice Actions*

The *Shideler* court was faced with a split among districts of the Indiana Court of Appeals regarding the application to legal malpractice actions of the malpractice statute of limitations found in Indiana Code section 34-4-19-1. The third district of the Indiana Court of Appeals initially held in *Cordial v. Grimm*[18] that section 34-4-19-1 had been intended by the legislature to apply to legal as well as medical malpractice actions.[19] However, the first district later held in *Shideler v. Dwyer*[20] that the legislature never intended such an application, a holding which was implicitly accepted by the second district in *Anderson v. Anderson*.[21]

At the outset of its opinion, the supreme court summarily rejected Shideler's argument that the statute of limitations governing actions for medical malpractice applies to legal malpractice actions:

> We are in accord with the Court of Appeals, First District, upon this issue and its holding that the doctrine of ejusdem generis limits the application to the term "or others," as used in said statute, to others of the medical care community. Accordingly, *Cordial v. Grimm* . . . is expressly overruled.[22]

In *Cordial*, a client brought a legal malpractice action for damages allegedly resulting from his attorney's actions or inactions

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[17]IND. CODE § 34-1-2-1 (1976) provides in pertinent part:

The following actions shall be commenced within six (6) years after the cause of action has accrued, and not afterwards.

First. On accounts and contracts not in writing.

. . . .

Third. For injuries to property other than personal property, damages for any detention thereof, and for recovering possession of personal property.

[18]169 Ind. App. 58, 346 N.E.2d 266 (1976), *noted in* 13 VAL. U.L. REV. 383 (1979).

[19]169 Ind. App. at 67-68, 346 N.E.2d at 272.

[20]386 N.E.2d 1211, 1215 (Ind. Ct. App. 1979), *vacated and remanded*, 417 N.E.2d 281 (Ind. 1981).

[21]399 N.E.2d 391 (Ind. Ct. App. 1979). The second district stated: "A cause of action for legal malpractice, however, does not accrue until the aggrieved party has suffered both an injury to his property and damages." *Id.* at 401 (citing Shideler v. Dwyer, 386 N.E.2d at 1215).

[22]417 N.E.2d at 283.

rendering Cordial's valid workmen's compensation claim worthless.[23] The client appealed an order granting summary judgment which the trial court based upon the grounds that the statute of limitations had expired. However, the trial court failed to specify the statute of limitations upon which it based its decision.[24] The Third District Court of Appeals affirmed the order, holding that the trial court could have found that the action was barred under either the first clause of section 34-1-2-2 or section 34-4-19-1.[25]

Judge Hoffman, writing for a split panel,[26] first noted that "statutes of limitation are statutes of repose which are founded upon considerations of justice and sound public policy, and are, therefore, favored by the courts."[27] He further acknowledged the warning in *Kidwell v. State*,[28] that the interpretative doctrine of ejusdem generis " 'should not become a device for unduly narrowing the scope and operation of statutes.' "[29] Based upon these two premises, Hoffman reviewed the overall text and history of section 34-4-19-1 to determine if the general wording of the statute prevented it from applying to malpractice actions against attorneys.

The court held that the title[30] of the Act and the text itself disclosed "no legislative intent that this statute be applied only in medical malpractice cases."[31] Hoffman further pointed out that at the time the law was passed, legislators were aware of malpractice actions against attorneys[32] and that the common law definition of malpractice was limited to wrongdoing by members of the two traditional professional groups, doctors and lawyers.[33] Therefore if the General Assembly had "wished to enact a statute applicable only to medical malpractice actions, it would have so indicated in its terms or text through the use of terms applicable to such actions."[34]

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[23]169 Ind. App. at 59-60, 346 N.E.2d at 268 (1976).

[24]*Id.* at 61, 346 N.E.2d at 268.

[25]*Id.* at 64-68, 346 N.E.2d at 270-72.

[26]Justice Staton concurred in the result. Justice Garrard concurred in a written opinion which agreed that section 34-1-2-2 controlled and did not reach the question of whether section 34-4-19-1 applied to legal malpractice actions. *Id.* at 70, 346 N.E.2d at 273-74.

[27]*Id.* at 65, 346 N.E.2d at 270 (citations omitted).

[28]249 Ind. 430, 230 N.E.2d 590 (1967), *cert. denied*, 392 U.S. 943 (1968).

[29]169 Ind. App. at 66, 346 N.E.2d at 271 (quoting Kidwell v. State, 249 Ind. 430, 432, 230 N.E.2d 590, 591-92 (1967), *cert. denied*, 392 U.S. 943 (1968)).

[30]The law was entitled "An Act Concerning Proceedings in Civil Malpractice Cases." Act of March 6, 1941, ch. 116, § 1, 1941 IND. ACTS 328 (codified at IND. CODE § 34-4-19-1 (1976)). The statute was given the heading "Actions—Malpractice—Limitation of Actions." 1941 IND. ACTS 328.

[31]169 Ind. App. at 67, 346 N.E.2d at 271.

[32]*Id.* at 67, 346 N.E.2d at 272.

[33]*Id.* at 67-68, 346 N.E.2d at 272.

[34]*Id.* at 67, 346 N.E.2d at 271-72.

In *Shideler*, the First District of the Indiana Court of Appeals initially distinguished *Kidwell's* caution against mechanically using ejusdem generis, upon the grounds that *Kidwell*, and an earlier case, *Woods v. State*,[35] referred to reliance "upon the doctrine in an effort to limit the proscriptions of a criminal statute."[36] The court concluded that if: "the legislature had intended the statute to apply to malpractice cases brought against attorneys, we are confident that either it would have omitted its listing [of medical specialists] altogether or it would have included attorneys in its listing."[37] The court also rejected the suggestions made in *Cordial* that the listing of particular medical specialists in section 34-4-19-1 was an attempt to broaden the statute's application beyond the traditional limitation of malpractice to include professional wrongdoings by lawyers and doctors,[38] stating that "physicians and surgeons would be recognized as members of the medical profession and would not belong in any listing of 'exceptions.' "[39]

The supreme court summarily accepted the conclusions of the court of appeals.[40] The rejection of section 34-4-19-1 as the applicable statute of limitations is important because it would have barred any legal malpractice action not filed within two years of the *occurrence* of the negligent act or omission.[41]

B. The Choice Between Sections 34-1-2-1 and 34-1-2-2

The next step in the court's analysis was to determine whether Indiana Code section 34-1-2-1 or section 34-1-2-2 was the applicable statute of limitations. Section 34-1-2-1 could be deemed applicable to legal malpractice actions by virtue of either its first or third clause.[42] The court first addressed the plaintiff's assertion that her suit sounded in contract rather than in tort, which would have rendered the first clause of section 34-1-2-1 the applicable statute of limitations. The court rejected this argument. The court held that " *'it is the nature or substance of the cause of action rather than the form of the action, which determines the applicability of the statute*

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[35]236 Ind. 423, 140 N.E.2d 752 (1957).

[36]386 N.E.2d at 1214.

[37]*Id.*

[38]169 Ind. App. at 67-68, 346 N.E.2d at 272.

[39]386 N.E.2d at 1214 n.3.

[40]417 N.E.2d at 283.

[41]The test incorporated into section 34-4-19-1 for determining when a cause of action accrues reflects the traditional rule applicable to legal malpractice actions. *See* notes 53-54 *infra* and accompanying text.

[42]*See* note 17 *supra*.

of limitations.' "[43] Applying this test to the manner in which the plaintiff pleaded her case, the court clearly identified the nature of Dwyer's cause of action: "the number and variety of Plaintiff's technical pleading labels and theories of recovery cannot disguise the obvious fact—apparent even to a layman—that this is a malpractice case, and hence is governed by the statute of limitations applicable to such actions."[44]

The court proceeded to determine whether the third clause of section 34-1-2-1 or the first clause of section 34-1-2-2 should be applied as the appropriate statute of limitations. Indiana Code section 34-1-2-1 is a six year statute of limitations which applies to "injuries to property other than personal property,"[45] whereas section 34-1-2-2 applies to "injuries to person or character, for injuries to personal property. . . ."[46] A comparison of these two statutes reveals that the issue of which is the appropriate statute of limitations would be determined by the court's decision on whether or not a cause of action for legal malpractice is one for injury to personal property.

In deciding whether a claim for legal malpractice is a claim for injury to personal property, the court noted that Indiana courts have "consistently viewed 'personal property' in its broad and natural sense, and have rebuffed arguments for a narrow and technical interpretation of the term."[47] The court further explained that under Indiana's broad definition of personal property it is clear that "the first clause of § 34-1-2-2 '* * * is not to be limited only to direct injuries to chattels, *but also incorporates violations to a person's rights and interests in or to such property*.' "[48] Consequently, the court held that the plaintiff's action for legal malpractice was "one for injuries to personal property within the meaning of Ind. Code § 34-1-2-2."[49]

The court's holding that a cause of action for legal malpractice is a claim for an injury to personal property was also influenced by the following declaration of policy made by the court at the outset of its opinion:

> Formerly statutes of limitations were looked upon with disfavor in that they are invariably in derogation of the com-

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[43]417 N.E.2d at 285 (emphasis in original) (quoting Koehring Co. v. National Automatic Tool Co., 257 F. Supp. 282, 292 (S.D. Ind. 1966), *aff'd per curiam*, 385 F.2d 414 (7th Cir. 1967)).

[44]417 N.E.2d at 286.

[45]IND. CODE § 34-1-2-1 (1976).

[46]*Id.* § 34-1-2-2 (1976).

[47]417 N.E.2d at 287.

[48]*Id.* (emphasis in original) (quoting Rush v. Leiter, 149 Ind. App. 274, 279, 271 N.E.2d 505, 508 (1971) (action for conversion of personal property consisting of farm produce and livestock)).

[49]417 N.E.2d at 288.

> mon law. "Now, however, the judicial attitude is in favor of statutes of limitations, rather than otherwise, since they are considered as statutes of repose and as affording security against stale claims. Consequently . . . the courts are inclined to construe limitation laws liberally, so as to effect the intention of the legislature. . . ." Such statutes rest upon sound public policy and tend to the peace and welfare of society and are deemed wholesome. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it.[50]

This declaration of policy is consistent with the court's eventual finding that the six year statute of limitations provided by the third clause of Indiana Code section 34-1-2-1 was not applicable to legal malpractice actions.

The adoption of section 34-1-2-2 by the *Shideler* decision has resolved the uncertainty in Indiana regarding which statute of limitations applies to legal malpractice actions. As the *Shideler* opinion demonstrates,[51] however, the application of section 34-1-2-2 will "immerse Indiana courts into the often confusing analysis of when a cause of action accrues."[52]

IV. The Accrual of an Action for Legal Malpractice

Three different rules have developed regarding when the statute of limitations begins to run on an action against an attorney for malpractice. The traditional rule holds that an action for malpractice accrues upon the occurrence of the negligent act.[53] The statute of limitations may expire prior to any actual injury to the plaintiff, however, thereby creating injustice and hardship without indemnification.[54] For these reasons, some courts have recently abandoned this rule and have adopted the discovery rule whereby negligence actions against attorneys do not accrue until the client discovers or

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[50]*Id.* at 283 (citations omitted).

[51]*See* notes 59-89 *infra* and accompanying text.

[52]Jackson, *supra* note 12, at 457. *See also* cases collected at note 96 *infra* for examples of the confusion and difficulty this analysis has created.

[53]*See, e.g.*, Wilcox v. Plummer, 29 U.S. (4 Pet.) 172 (1830). *See also* Annot., 18 A.L.R.3d 978 (1974); Mallen, *supra* note 12, § 200; Lathrop, *Legal Malpractice: Plaintiffs, Limiting Statutes and* Heyer v. Flaig, 37 Ins. Counsel J. 258 (1970). The rationale underlying this rule is expressed in Sullivan v. Stout, 120 N.J.L. 304, 199 A. 1 (1938). "An action by the client for the misfeasance or nonfeasance of his attorney is based on the latter's breach of duty, and not on the consequential damages subsequently resulting." *Id.* at 306, 199 A. at 3 (quoting 17 R.C.L. 977, § 132).

[54]*See* Note, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 Calif. L. Rev. 106 (1980); Note, *The Commencement of the Statute of Limitations in Legal Malpractice Actions—The Need for Re-Evaluation:* Eckert v. Schoal, 15 U.C.L.A. L. Rev. 230 (1967).

should have discovered facts which establish a cause of action.[55] The third rule holds that an action against an attorney for malpractice accrues when a person sustains injury and damage, regardless of that person's state of knowledge.[56]

The Indiana Supreme Court in *Shideler v. Dwyer*,[57] based its decision upon this latter rule in holding that Dwyer's cause of action was barred by the statute of limitations set out in Indiana Code section 34-1-2-2.[58] The court ruled that damage occurred and the cause of action accrued upon the death of the testator Moore, and not when the will was drafted or at some time after Moore's death when the will provision was adjudged to be invalid. This Comment suggests that the manner in which this form of the "damage" rule was applied in *Shideler* will result in unnecessary protective or provisional legal malpractice actions. This Comment further suggests that a different application of the "damage" rule would have avoided the problems posed by protective legal malpractice actions.

A. The Moment of Accrual

Under Indiana law, legal injury and damage are the elements necessary for a cause of action to accrue.[59] The statute of limitations

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[55]*See, e.g.*, Neel v. Magana, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971); Green v. Adams, 343 So.2d 636 (Fla. Dist. Ct. App. 1977); Kohler v. Woollen, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973); Cameron v. Montgomery, 225 N.W.2d 154 (Iowa 1975). *See also* MALLEN, *supra*, note 12, § 204; *but see* Note, *Legal Malpractice—Is the Discovery Rule the Final Solution?*, 24 HASTINGS L.J. 795 (1973).

[56]*See, e.g.*, Ft. Meyers Seafood Packers, Inc. v. Steptoe & Johnson, 381 F.2d 261 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 946 (1968); Price v. Holmes, 198 Kan. 100, 422 P.2d 976 (1967); Marchand v. Miazza, 151 So.2d 372 (La. App. 1963). *See also* MALLEN, *supra* note 12, § 201.

[57]417 N.E.2d 281 (Ind. 1981).

[58]*See* notes 12-50 *supra* and accompanying text.

[59]Montgomery v. Crum, 199 Ind. 660, 678, 161 N.E. 251, 258-59 (1928); Board of Comm'rs v. Pearson, 120 Ind. 426, 428, 22 N.E. 134, 135 (1889).

The court of appeals in *Shideler* defined "injury" and "damages" by quoting from an early Indiana Supreme Court decision which stated in part:

> There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury.
>
> . . . The one is the legal wrong which is to be redressed, the other the scale or measure of the recovery.

City of North Vernon v. Voegler, 103 Ind. 314, 318-19, 2 N.E. 821, 824 (1885) (citations omitted), *quoted in* 386 N.E.2d at 1215. The Indiana Supreme Court rejected this definition of "damages," however, noting that the lower court "confused *damage*, as a requisite element of any tort with *damages* as a measure of compensation. For a wrongful act to give rise to a cause of action . . . , it is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred." 417 N.E.2d at 289 (emphasis in original).

does not begin to run until these two elements coalesce resulting in the accrual of a cause of action.[60] The imposition of these requirements is logical because the law generally does not render one liable to an action until he has inflicted a legally-cognizable injury and damage.[61] The apparent simplicity and logic of these requirements, however, do not result in easy application. Great difficulty lies in determining the point at which a cause of action accrues.

The supreme court focused upon the damage element of this two-pronged test because there was no issue with respect to legal injury in *Shideler*. The majority ultimately held that Dwyer suffered loss or harm (damage) on the date Robert Moore died because his will then had a "dispositive effect."[62] The effect of this holding was to regard Dwyer's cause of action for legal malpractice as having accrued more than two years before it was brought. Consequently, Dwyer's action for legal malpractice was barred.

The Indiana Supreme Court began its analysis of the damage element of the accrual inquiry by reviewing a factually similar case from Kansas. This case, *Price v. Holmes*,[63] involved a cause of action for legal malpractice in which an attorney negligently supervised the execution of a will. In *Price*, the Kansas Supreme Court relied upon an earlier Kansas case, *Kitchener v. Williams*,[64] where the defective installation of plumbing equipment resulted in an explosion two years later. It was held in *Kitchener* that the plaintiff's cause of action did not accrue until the explosion of the plumbing equipment had occurred, the time that the tortious act occasioned damage.[65] In the *Price* case, the Kansas Supreme Court held that the "explosion" occurred when the testator's will was declared void because it was on that date that "the ground fell from under Lillian Price; prior to that time the will had been held valid by two (2) courts, and Lillian had suffered no damage at the hands of Mr. Holmes."[66]

The Indiana Supreme Court disagreed with the opinion of the Kansas Supreme Court on the question of when damage occurred. The Indiana court explained:

> The fallacy in the Kansas opinion is the conclusion that there had been no *injury* done until the Supreme Court said

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[60]199 Ind. at 678, 161 N.E. at 258-59.

[61]*Id.*; Merritt v. Economy Dep't Store, Inc., 125 Ind. Ct. App. 560, 564, 128 N.E.2d 279, 280-81 (1955).

[62]417 N.E.2d at 290.

[63]198 Kan. 100, 422 P.2d 976 (1967).

[64]171 Kan. 540, 236 P.2d 64 (1951).

[65]*Id.* at 551-52, 236 P.2d at 73.

[66]198 Kan. at 105, 422 P.2d at 980-81.

> so. Our Court of Appeals was led into the same trap but relegated the task of effecting the "explosion" to the Marion County Probate Court, overlooking the theoretical possibility that the *injury* might have been averted by appellate proceedings.[67]

The Indiana Supreme Court's description of the "fallacy" in the *Price* decision indicates its belief that the Kansas court should not have concluded that *injury* does not occur until the supreme court says so. This, however, is not an accurate evaluation of the Kansas Supreme Court's conclusion in *Price*. In *Price*, the Kansas court held that "Lillian [Price] had suffered no *damage*"[68] until the will had been declared void.

The Kansas Supreme Court's holding that no *damage* had resulted to Lillian Price until it declared the will void is quite defensible. No loss for which the law allows indemnity had actually resulted to Lillian Price until that date because the will had previously been held valid by two different Kansas courts.

The Indiana Supreme Court's analysis of the *Price* case was flawed in two respects. First, the Indiana Supreme Court misapprehended what the Kansas court concluded regarding when damage occurs. Second, the Indiana Supreme Court failed to take notice of the Kansas Supreme Court's analysis in *Price* of when loss or harm (damage) has actually been suffered. The analysis in *Price* of the damage issue was more accurate than that of the *Shideler* majority because the *Price* court focused upon when damage *actually* resulted to the plaintiff.

Under common law decisions,[69] the damage portion of the accrual test seeks to identify when damage is actually suffered, not when it *might* be suffered. The *Shideler* opinion focused on the point at which damage *might* have been suffered. The surprising result in *Shideler* might be explained by the Indiana Supreme Court's apparent dissatisfaction with the prospect of waiting until the appellate process is complete before a cause of action would accrue for a particular act of legal malpractice.[70] This concern is manifested by the Indiana Supreme Court's statement in *Shideler* that "[t]he fallacy in the Kansas opinion is the conclusion that there had been no injury done until the Supreme Court said so."[71]

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[67]417 N.E.2d at 289 (emphasis added).

[68]198 Kan at 105, 422 P.2d at 980-81 (emphasis added).

[69]*See, e.g.*, Essex Wire Corp. v. M.H. Hilt Co., Inc., 263 F.2d 599 (7th Cir. 1959); Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928).

[70]This is exactly what happened in Price v. Holmes, 198 Kan. 100, 422 P.2d 976 (1967).

[71]417 N.E.2d at 289.

This concern may have steered the Indiana Supreme Court away from making a practical analysis in *Shideler* regarding when damage was actually suffered.[72] In most instances, whether any loss or harm (damage) actually results from an attorney's services will depend upon a finding that the particular work did not have its intended effect. Under the facts of *Shideler*, such a finding was certainly a prerequisite to damage being incurred. As a practical matter, no compensable damage could be proven by Mary Catherine Dwyer without such a finding by a trial or appellate court. Unfortunately, the court seemed to overlook this need to assess, in a practical way, the damage prong of the accrual test.

After discussing the *Price* case, the Indiana Supreme Court continued its analysis of the damage element of the test for accrual by discussing its decision in *Board of Commissioners v. Pearson*.[73] In *Pearson*, the plaintiff brought an action in 1884 for injuries allegedly suffered due to the negligent design of a bridge constructed in 1871. The court held that the cause of action did not accrue until Pearson's injury in 1884 even though the alleged negligence of the defendant occurred thirteen years earlier.[74]

The court discussed the applicability of the *Pearson* rationale to the facts of *Shideler*:

> The drafting of Moore's Will and the resulting disappointment to Plaintiff may be likened to the construction of the bridge and its subsequent collapse in the *Pearson* case (supra). In both, the wrong preceded the damage by a considerable period of time. In neither, did the cause of action accrue until damage resulted from the wrong. In the case of the bridge, the damage occurred and the cause of action accrued when the bridge collapsed. That is when damage resulted to Pearson.
>
> When did damage to Plaintiff result from Defendant's alleged negligence? Not when the Will was drafted or executed, because it had to await the death of Moore before it would have any dispositive effect. But at his death, the instrument was operative; and, just as the negligent construction of the bridge in *Pearson* became irremediable with its collapse under Pearson's weight, the wrong, if any, set in

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[72]Common law decisions in Indiana indicate that the test for determining whether damage has been sustained involves a determination that loss or harm has actually been suffered. *See* note 69 *supra*.

[73]120 Ind. 426, 22 N.E. 134 (1889).

[74]*Id.* at 428, 22 N.E. at 135.

> motion with the drafting of Moore's Will became *irremediable* with his death.[75]

This portion of the majority's opinion which analogizes to the *Pearson* case is fraught with analytical problems. The major problems include the erroneous parallel the majority draws from *Pearson* to *Shideler*, and the court's apparent change in its analysis of the damage element of the accrual test.

The flaws in the parallel drawn from *Pearson* to *Shideler* by the majority were aptly summarized by Chief Justice Givan in his dissent:

> The majority takes the position that in the case at bar the impingement to the plaintiff first occurred when the will was probated. Thus, likening that incident to the incident of the collapse of the bridge. If we draw a parallel between the two cases, it would seem the negligence in constructing the bridge parallels the negligence, if any, in constructing the will. The probate of the will would parallel the opening of the bridge to traffic. The collapse of the bridge parallels the decision of the Probate Court in holding that the bequest to the plaintiff was void and of no force and effect.[76]

Chief Justice Givan's analogy from *Pearson* to *Shideler* is infinitely more clear than that of the majority. The majority purported to rely on *Pearson*. Had it properly applied *Pearson*, however, it would not have held that Mary Catherine Dwyer's cause of action was barred.

Additionally, the majority's analysis of *Pearson* seems to change the damage portion of the accrual test. The first paragraph of the majority's analysis of *Pearson*[77] discusses the facts of *Pearson* and focuses on when damage resulted to Pearson from the tort. The second paragraph of the majority's analysis determines when damage was incurred by Mary Catherine Dwyer. At this point, the majority shifts from a traditional analysis of the damage element which includes an assessment of when compensable loss or harm was actually incurred to an inquiry into when the act became *irremediable*.

This seems to change the test set out early in the *Shideler* majority opinion[78] and in numerous other decisions construing Indiana law.[79] Although it is the prerogative of the supreme court to make such a change in Indiana common law, a change from the traditional test to a focus upon when the lawyer's work became ir-

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[75]417 N.E.2d at 290 (emphasis added).

[76]*Id.* at 295 (Givan, C.J., dissenting).

[77]*See* text accompanying note 74 *supra*.

[78]417 N.E.2d at 289.

[79]*See* note 69 *supra*, and accompanying text.

remediable yields unfortunate results. If the focus suggested by the majority opinion in *Shideler* is upon when the questionable legal work becomes *irremediable*, rather than upon when loss or harm (damage) actually occurred, the result in extreme cases is that a cause of action for legal malpractice could be barred even before the attorney's malpractice liability arises.

For example, assume that a contract for the sale of certain goods was executed more than two years ago with a disclaimer of the warranty of merchantability that *might* not have been sufficiently conspicuous to constitute a valid disclaimer despite the fact that merchant "A" who hired the attorney to draft the contract specifically requested such a disclaimer. More than two years after the execution of the contract, suit on the warranty of merchantability has been brought against merchant "A" by merchant "B". Consequently, merchant "A" wants to sue his attorney for legal malpractice. However, merchant "A" who hired the lawyer would have no cause of action against the lawyer because the staute of limitations would have run from the point at which the "effective" warranty became irremediable under the *Shideler* analysis.[80] In such a case, compensable damage in a legal malpractice action would not have been suffered by merchant "A" until merchant "B" won or at least initiated his suit for breach of the warranty of merchantability.[81] It would not be until merchant "B" collected in his cause of action that liability would arise for legal malpractice. Thus, the cause of action for legal malpractice would be barred before any liability for legal malpractice arose because no such liability can arise until it can be proven that the contract did not have its intended effect.

Other details of the majority's view of the damage element are disturbing. The court states that the declaration by the Marion County Probate Court[82] "was not the explosion of the plumbing [*Kitchener*] nor the collapse of the bridge [*Pearson*]."[83] Instead, the court held that "[t]he explosion occurred when Moore died."[84] Clearly, impact to person or property, precipitating certain losses or harms, occurred immediately after the explosion in *Kitchener* and the collapse in *Pearson*. No contingencies prevented these losses or harms (damage) from being suffered. No such impact can be shown at Moore's death under the facts of *Shideler*; nevertheless, the Indiana

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[80]The suit would be barred under *Shideler* because the contract was executed and had a "dispositive effect" more than two years before suit was (or would have been) brought.

[81]To prevail, merchant "B" would have to prove that the disclaimer was not a valid disclaimer.

[82]*See* text accompanying note 6 *supra*.

[83]417 N.E.2d at 291.

[84]*Id.*

Supreme Court held that Dwyer suffered damage at Moore's death.[85] The court did not specify what particular loss or harm was suffered by Dwyer at that point, and the facts given by the court fail to demonstrate what damage actually resulted at Moore's death. The facts, however, do indicate that damage would be suffered *if* the testamentary provision were declared void.

The court on several occasions also emphasized that a determination of when damage is suffered should not be confused with ascertaining the *extent of damages*.[86] This is a valid admonition because the only inquiry should be whether damage has been suffered; the extent of damage is immaterial to the accrual inquiry. However, this concern should not prompt courts to find that damage has occurred before any loss or harm is actually suffered. This concern may have been an additional motivation behind the court's ultimate holding that Dwyer suffered damage when Robert Moore died.[87]

A final influence upon the court's holding was its continuing interest in advancing the general policy behind statutes of limitation. In addition to the court's general statement of this policy early in its opinion,[88] the court reiterated the policy, acknowledging, after it reached its conclusion that Dwyer's cause of action had accrued more than two years before it was brought, that an occasional injustice might result.[89]

B. Postponement of Accrual

The facts in *Shideler* did not present each possible set of circumstances which could potentially postpone the accrual of a cause of action for legal malpractice.[90] However, two important sets of circumstances which warrant discussion were mentioned in the opinion. The first set suggests postponement of accrual when the aggrieved party does not actually know or in the exercise of reasonable care would not have known that an invasion of his rights has occurred by an act of legal malpractice.[91] The other set of circumstances mentioned in *Shideler* involves the situation in which the relationship between the negligent attorney and the client continues beyond the negligent act, and the attorney fraudulently conceals the action for legal malpractice.[92] The dicta in *Shideler* regarding

[85] *Id.*

[86] *See* note 59 *supra.*

[87] 417 N.E.2d at 291.

[88] *See* text accompanying note 50 *supra.*

[89] 417 N.E.2d at 291.

[90] *See, e.g.*, Lehman v. Scott, 113 Ind. 76, 14 N.E. 914 (1888) (infancy); Grooms v. Fervida, 396 N.E.2d 405, 409-10 (Ind. Ct. App. 1979) (imprisonment in state prison). *See also* IND. CODE § 34-1-2-5 (1976) (two year tolling provision for legal disabilities).

[91] 417 N.E.2d at 291.

[92] *Id.*

both of these issues will have an important effect upon determining when a cause of action for legal malpractice may be postponed, thereby extending the statute of limitations.

1. The Discovery Rule.—In several jurisdictions, an action for professional malpractice does not accrue until the plaintiff actually knows, or in the exercise of reasonable care should have known, all facts essential to proving the elements of a case for professional malpractice.[93] This rule has generally become known as the "discovery rule."[94]

The majority opinion in *Shideler* addressed the applicability of the discovery rule in a strange manner. The court did not relate the discovery rule to Indiana's common law requirement that injury and damage must coalesce before a cause of action accrues. At this point in its opinion,[95] the majority could have clarified much of the confusion that has existed under Indiana law by addressing the discovery rule in relation to the elements of injury and damage. Many lawyers cannot determine under Indiana law if damage occurs when it is suffered, or if damage occurs when it is suffered *and* discovered. This confusion is understandable in light of several cases which have stated that a cause of action accrues upon the occurrence of injury and "damages *susceptible of ascertainment.*"[96]

The *dicta* of the *Shideler* majority opinion could have clarified this confusion by affirmatively stating that, under the accrual inquiry, damage is suffered regardless of the aggrieved party's knowledge of the damage, or alternatively, damage is suffered only if such knowledge was or could have been possessed by one exercising due diligence.

The court did neither, however, but made the following comments about the discovery rule:

> There is authority supporting the proposition that statutes of limitation attach when there has been notice of an invasion of a legal right of the plaintiff or he has been put

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[93]*See, e.g.*, Munford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1969); Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979); Niedermeyer v. Dusenbery, 275 Or. 83, 549 P.2d 1111 (1976). *See also* cases cited at note 55 *supra.*

[94]*See* notes 54-55 *supra* and accompanying text.

[95]417 N.E.2d at 291-92.

[96]*See, e.g.*, Essex Wire Corp. v. M.H. Hilt Co., 263 F.2d 599, 602 (7th Cir. 1959); Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 880 (S.D. Ind. 1970) (quoting Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836, 840 (7th Cir. 1957)); Montgomery v. Crum, 199 Ind. 660, 679, 161 N.E. 251, 259 (1928); Scates v. State, 383 N.E.2d 491, 493 (Ind. Ct. App. 1978).

The *Shideler* court did say at one point that for a cause of action to accrue, "it is not necessary that the extent of the damage be known or *ascertainable* but only that damage has occurred." 417 N.E.2d at 289 (dicta) (emphasis added). It is unclear whether this was intended to overrule prior case law cited above in this footnote.

> on notice of his right to a cause of action. There may be special merit to that viewpoint where, as in *Neel v. Magna* [*sic*] . . . , the plaintiff was the client or the patient, but we do not have that problem.
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> We also note that in many cases where the discovery rule has been applied or alluded to, the misconduct was of a continuing nature or concealed, which also was the situation in *Neel v. Magna* [*sic*]. . . .[97]

From this discussion of the discovery rule, it seems that the court does not regard the rule as a common law creation which aids in the determination of when damage is suffered thus causing action to accrue. The court is apparently suggesting that discovery of the harm has a bearing on the accrual of an action only when the attorney actually or constructively conceals from the client a cause of action for legal malpractice. This suggestion only defers the issue to an analysis of the statutory tolling provision of fraudulent concealment[98] and avoids addressing the merits of the discovery rule. Consequently, the majority opinion of *Shideler* provides little definitive guidance regarding whether the discovery rule will apply to legal malpractice actions.

The dissent's analysis of the discovery rule differed markedly from the majority's. The dissenting justices reviewed the history of California's treatment of the discovery rule.[99] This review revealed California's switch from its original position that the statute of limitations began to run from the time the act or omission constituting legal malpractice occurs to the eventual adoption of the discovery rule.[100] The discovery rule that emerged from California's process of evolution was quoted by the dissenting justices in *Shideler*: " 'in an action for professional malpractice against an attorney, the cause of action does not accrue until the plaintiff knows, or should know, all material facts essential to show the elements of that cause of action.' "[101]

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[97]417 N.E.2d at 291 (citations omitted).

[98]IND. CODE § 34-1-2-9 (1976). *See also* notes 106-14 *infra* and accompanying text.

[99]417 N.E.2d at 295-96.

[100]*Id.* at 296.

[101]*Id.* (quoting Neel v. Magana, 6 Cal. 3d 176, 190, 491 P.2d 421, 430, 98 Cal. Rptr. 837, 846 (1971)).

The majority had cited an earlier California case, Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969), to support its holding that Dwyer's cause of action accrued at the death of the testator. 417 N.E.2d at 283, 290. The dissent, in addition to noting that *Neel* indicates that California has changed its position, *id.* at 295-96, distinguished *Heyer* factually from the *Shideler* case. In *Heyer*, the attorney negligently left out a provision, while in *Shideler*, the provision was included, but was negligently drafted. Therefore, the dissent said, "[u]nlike the instant case, the negligence of *Flaig* was discoverable upon the death of the testatrix." *Id.* at 295.

The dissent noted that the majority of states still adhere to the rule that the statute of limitations on a claim for legal malpractice runs from the date the negligent act occurs.[102] The dissent listed cases from several other jurisdictions, however, which have adopted the discovery rule.[103] The dissenting justices did not specifically suggest that Indiana adopt the discovery rule; however, they quoted from an opinion of the Supreme Court of Appeals of West Virginia which they stated had made the "most poignant statement by a Court justifying the application of the discovery rule":[104]

> We are inclined to agree with the defendant that it is the majority view in this country that as a general proposition this statute of limitations begins to run from the date of the commission of the act of professional malpractice rather than from the date of discovery. However, we do not agree with the defendant's cavalier dismissal from consideration of the cases which subscribe to the so-called minority view. We do not equate an "overwhelming number of cases", as expressed in the defendant's brief, with justice and right.[105]

Shideler may not be properly cited for the proposition that the discovery rule has been either accepted or rejected because *Shideler* involved a plaintiff who was aware of the harm she had suffered due to the alleged acts of the legal malpractice. The dicta of the majority opinion, however, indicate that if the court was squarely presented with the issue, three of the justices would probably vote not to apply the discovery rule to postpone the accrual of a cause of action for legal malpractice.

2. Fraudulent Concealment.—In several Indiana medical malpractice cases, Indiana appellate courts have held that the statute of limitations for medical malpractice is tolled by the actual or constructive fraudulent concealment of the cause of action by the attending physician.[106] These cases have extended the doctrine of fraudulent concealment to a point where fraudulent concealment of a cause of action against the medical practitioner presumptively exists

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[102]*Id.* at 297.

[103]*Id.*

[104]*Id.*

[105]*Id.* (quoting Family Savings & Loan, Inc. v. Ciccarello, 157 W.Va. 983, 207 S.E.2d 157 (1974)).

[106]*See, e.g.*, Carrow v. Streeter, 410 N.E.2d 1369, 1375-76 (Ind. Ct. App. 1980); Adams v. Luros, 406 N.E.2d 1199, 1202-03 (Ind. Ct. App. 1980).

It should be noted that IND. CODE § 34-1-2-9 specifically discusses the effect of fraudulent concealment and states in part: "If any person liable to an action, shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation, after the discovery of the cause of action." *Id.*

until the doctor-patient relationship is terminated.[107] Before the Indiana Supreme Court handed down its decision in *Shideler*, doubt existed as to whether the doctrine of fraudulent concealment would be extended to apply to legal malpractice cases as well. The *Shideler* decision, however, did little to eliminate this uncertainty.

The court was not faced with the issue of fraudulent concealment within the context of legal malpractice because the plaintiff in *Shideler* was not a party to the attorney-client relationship.[108] Dicta within the majority's opinion, however, suggest that the doctrine of fraudulent concealment might apply to legal as well as medical malpractice cases. The majority opinion first noted the absence of any "unique relationship between a lawyer who drafts a will and one who is merely the object of his client's [the testator's] bounty that calls for a special rule. Without more, there is no continuing obligation to the devisee."[109] Clearly, a continuing fiduciary obligation to the client is an important rationale for tolling the statute of limitations on the basis of constructive fraudulent concealment. The majority opinion additionally pointed out that: "Although we hold that a disappointed beneficiary's action, if any, would accrue simultaneously with the death of the testator and that the statute of limitations would then begin to run, we recognize that such statutes are subject to avoidance under certain recognized circumstances."[110] Again the majority is suggesting, albeit in dicta, that fraudulent concealment may prevent the cause of action from accruing, but not under the *Shideler* facts.

Some doubt therefore remains as to whether the doctrine of fraudulent concealment will postpone the accrual of a cause of action for legal malpractice. Given the dicta of the majority opinion in *Shideler*, however, it may be reasonably concluded that an actual or constructive fraudulent concealment may postpone the accrual of a cause of action for legal malpractice. The opinions in *Carrow v. Streeter*,[111] and *Adams v. Luros*,[112] both medical practice actions, indicate that fraudulent concealment can be extremely important in determining whether the statute of limitations has run. The application of this doctrine to legal malpractice actions will make it difficult to obtain summary judgment on the basis of the statute of limita-

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[107]*See* cases cited in note 106 *supra*.

[108]If the plaintiff had been a party to the attorney-client relationship, the issue of constructive, and possibly actual, fraudulent concealment would probably have arisen. *Id.*

[109]417 N.E.2d at 291.

[110]*Id.* at 294.

[111]410 N.E.2d 1369.

[112]406 N.E.2d 1199.

tions when the aggrieved party was also a party to the attorney-client relationship.[113]

V. CONCLUSION

The Indiana Supreme Court should have held that Mary Catherine Dwyer's cause of action for legal malpractice did not accrue until the Marion County Probate Court declared void the provision in Robert Moore's will. This would have avoided the problems posed by protective legal malpractice actions required in certain circumstances as a consequence of *Shideler*.

Exactly why the Indiana Supreme Court reached this conclusion is unclear. The court could have arrived at its ultimate holding based solely upon its analysis of the damage element of the accrual test.[114] It is also possible the court reached its decision in *Shideler* on the basis of its analysis of applicable policy considerations. It is more likely that these two possibilities are inextricably intertwined.

If the court reached its decision largely on the basis of policy considerations, it would be interesting to discover the weight attached by the majority to the policy considerations which weigh heavily against the court's decision. Perhaps the most important of these considerations is the prospect of protective or provisional legal malpractice suits being filed against attorneys. This type of suit is especially objectionable when it is not at all clear whether the attorney's services have had their intended effect.[115] The effect of such a premature suit is to needlessly diminish an attorney's professional reputation.

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[113]This difficulty will stem from the factual issues that normally exist as to when the attorney-client relationship terminated. Given the rule under *Adams* that fraudulent concealment presumptively exists until the professional relationship is terminated, this factual dispute can alone defeat a summary judgment motion based on the statute of limitations. *Id.* at 1202-03.

[114]*See* text accompanying notes 53-59 *supra*.

[115]In order to avoid encouraging provisional lawsuits, several courts have held that a cause of action for legal malpractice does not accrue until an attorney's work has been shown to be erroneous or negligent. *See, e.g.*, Kohler v. Wollen, 15 Ill. App. 3d 455, 460, 304 N.E.2d 677, 680 (1973) (wrongful death claim); Delesdernier v. Miazza, 151 So. 2d 372, 375-76 (La. Ct. App. 1963) (breach of employment contract); United States Nat'l Bank v. Davies, 274 Or. 663, 670, 548 P.2d 966, 969-70 (1970) (sale of stock).

In Commercial Credit Corp. v. Ensley, 148 Ind. App. 151, 264 N.E.2d 80 (1970), the court held that an action for malicious prosecution was not barred by the statute of limitations because the action did not accrue until pending litigation reached a final disposition. "To hold appellee's action was barred by the statute of limitations would have the effect of forcing parties to initiate litigation with the full knowledge that it may be groundless. This we will not do." *Id.* at 160-61, 264 N.E.2d at 86. Yet the *Shideler* rule forces the plaintiff to engage in potentially "groundless" litigation.

Another policy consideration weighing against the majority's holding is the fact that one aggrieved by an act of legal malpractice may have her action barred before liability for such malpractice ever arises.[116] The final policy consideration weighing against the majority's holding is that if Dwyer had filed a protective legal malpractice suit against the drafting attorney, Dwyer might well have been placed in the untenable position of simultaneously defending the validity of the will provision in one suit and attacking its validity in another.[117]

The major policy consideration supporting the majority's decision appears to be the general policy behind statutes of limitation.[118] This policy essentially holds that statutes of limitation are statutes of repose and " 'tend to [promote] the peace and welfare of society.' "[119] Additionally, the majority's holding is supported by a concern with avoiding stale evidence and witnesses with dull memories as well as avoiding the time-consuming process of determining whether a lawyer's work will have its intended effect. Few could persuasively argue, however, that these policy considerations are more compelling than the policy considerations weighing against the majority's holding in *Shideler*.

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[116]*See* text accompanying notes 78-81 *supra*.

[117]This problem was implicitly noted by Chief Justice Givan in his dissent. 417 N.E.2d at 296. *See also* United States Nat'l Bank v. Davies, 274 Or. at 663, 548 P.2d at 966.

[118]417 N.E.2d at 283, 291. *See also* notes 88-89 *supra* and accompanying text.

[119]417 N.E.2d at 291 (quoting Craven v. Craven, 181 Ind. 553, 559, 103 N.E. 333, 335 (1913)).

Notes

The Effect of Title VII on Black Participation in Urban Police Departments

I. INTRODUCTION

A major difficulty confronting urban police departments is the demands of blacks to be represented within police forces on more than a token basis.[1] Embedded within the issue of black representation is a concern for the advancement of blacks to decision-making positions within urban police departments. Both of these concerns, hiring and promotion, have produced a great amount of litigation.[2] The departure point of this Note is that given the high rate of black unemployment,[3] there is a need to view Title VII of the Civil Rights Act of 1964[4] as more than a way of extirpating employment discrimination. In particular, a broader interpretation of Title VII would view it as a basis for demanding proportional representation in many occupations for black people. During the era[5] in which Title VII evolved, it may have been necessary to perceive it merely as a mechanism to eradicate employment discrimination. Because the more overt legalized forms of racial discrimination have been eliminated, that perception of Title VII is no longer adequate to address the employment grievances of black people in general and black police officers in particular.

In 1968, the proportion of blacks within twenty-eight police departments returning information on black representation within their departments to the Kerner Commission[6] was far below the

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[1]*See* NATIONAL ADVISORY COMMISSION ON CIVIL DISORDER 165 (1968) [hereinafter "KERNER COMMISSION"].

[2]*See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[3]During the third quarter of 1979, the unemployment rate of black males 20 years old and over was 8.3% compared with the 3.3% rate of white males of similar age. The same age comparison for black females and white females was 11.4% for black females and 5.2% for white females. With respect to black males between the ages of 16 and 19, the unemployment rate in comparison to white males of similar age was 30.3% for blacks and 12.8% for whites. In addition, the unemployment rate comparison for black and white females within the 16 to 19 year old age bracket was 38.6% for black females and 14.2% for white females. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 10, EMPLOYMENT AND EARNINGS 79, 83 (1979).

[4]42 U.S.C. §§ 2000e to 2000e-17 (1976).

[5]During the 1960's, there were more overt forms of employment discrimination used against black people. However, the more subtle forms of employment discrimination will be the issue of the 1980's.

[6]KERNER COMMISSION, *supra* note 1, at 169. Some of the cities returning data

proportion of blacks in the population of the area in which the departments were located.[7] Although proportional representation is not mandated by Title VII, statistical information on black employment can be used to establish a *prima facie* case of discrimination.[8] Consideration must be given to evaluating the success of Title VII, with respect to urban police department employment practices, solely on the basis of its effect on increasing black representation within the departments. The need for this evaluative perspective is accentuated by the hostility between predominantly white police forces and black communities, which has been cited as a major cause of the urban riots that occurred between 1964 and 1968.[9] The perception of police by blacks is drastically different from the perception of police by whites.[10]

In summary, this Note will:

1. Set forth statutes under which actions challenging police employment practice were brought prior to Title VII's application to police departments;
2. Compare the pre-Title VII statutes with Title VII;
3. Analyze cases brought under the pre-Title VII statutes, because Title VII standards were often used in adjudicating these cases;
4. Analyze the legislative history of and cases brought under Title VII; and
5. Present ideas on how to utilize Title VII purely as a basis to increase black representation within urban police departments.

II. Statutes Prior to Title VII

Before discussing the effects of Title VII on the hiring and promotion of blacks within urban police departments, it is necessary to examine statutes that proscribed discriminatory police employment practices prior to Title VII. Although Title VII was inapplicable to police employment practices until 1972,[11] many actions before 1972

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were Boston, Atlanta, Detroit, Tampa, New Orleans, Newark, Chicago, and Memphis. *Id.*

[7]*Id.* at 165, 169.

[8]Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971).

[9]*See* Kerner Commission, *supra* note 1, at 157.

[10]In a 1968 survey, more blacks than whites reported the use of insulting language or disrespect by police. In addition, three times as many blacks as whites thought police searched people without good cause. National Advisory Commission on Civil Disorder, Racial Attitudes in Fifteen American Cities 42-43 (1968) (Supplemental Studies).

[11]*See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending Civil Rights Act of 1964).

challenging urban police department employment practices were analyzed under Title VII standards.[12] Thus, it is necessary to consider the effects of Title VII on black representation within urban police departments as far back as 1964.[13]

Five federal Civil Rights Acts[14] were adopted by Congress after the Civil War. There was not another comparable statute enacted until the passage of the Civil Rights Act of 1957.[15] In view of the importance of 42 U.S.C. sections 1981[16] and 1983[17] in the context of employment discrimination, these two sections will be analyzed to indicate how Title VII standards were applied to actions brought under them. In addition, the two sections will be studied to determine how they have been used to redress the employment grievances of black people interested in careers as police officers. Section 1981, which in its original form was part of section 1 of the Civil Rights Act of 1866,[18] provides that all persons in the United States "shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ."[19] Unlike judicial relief available under section 1983, which makes actionable the deprivation of civil

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[12]*See, e.g.*, Afro American Patrolmans League v. Duck, 503 F.2d 294 (6th Cir. 1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[13]Title VII of the Civil Rights Act of 1964 was originally only applicable to public employment practice. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (amended 1972).

[14]Act of March 1, 1875, ch. 114, 18 (pt. 3) Stat. 335 (1875); Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871); Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870); Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866).

[15]Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957) (current version at 42 U.S.C. §§ 1975-1975e (1976)).

[16]42 U.S.C. § 1981 (1976) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[17]42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[18]Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866). This statute was the major statute used to challenge discriminatory employment practices prior to the Civil Rights Act of 1964. *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, ch. 17 (1978).

[19]42 U.S.C. § 1981 (1976).

rights under color of state law,[20] the judicial relief available under section 1981 is not dependent on a showing of state action.[21] Section 1981 is applicable to public and private employment discrimination.[22] Under section 1983 there are several kinds of relief available, including compensatory damages,[23] punitive damages,[24] and injunctive relief.[25]

III. Comparison of Sections 1981 and 1983 with Title VII

Because sections 1981 and 1983 were not repealed by the Civil Rights Act of 1964, there is a choice between pursuing the administrative remedy under Title VII or the judicial remedy under sections 1981 and 1983 or both.[26] The Supreme Court has held that remedies available under Title VII and section 1981 are independent of each other.[27] Moreover, unlike Title VII,[28] section 1981 does not state a time limitation for a cause of action, and thus the period provided by the state statute of limitations for a comparable action is applicable.[29] Generally, section 1981 is limited in the extent to which it can be used to justify affirmative action programs. Section 1981 has not been interpreted to require employers to adopt affirmative action programs, but it does not preclude affirmative action programs instituted by courts.[30] Section 1983 has been interpreted as a basis to enforce section one[31] of the fourteenth amendment.[32] In addition, section 1983 makes the deprivation of civil rights under color of state statute actionable.[33]

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[20]*Id.* § 1983.

[21]Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 347 F. Supp. 268, 289 (E.D. Pa. 1972); Rice v. Chrysler Corp., 327 F. Supp. 80, 86 (E.D. Mich. 1971).

[22]Guerra v. Manchester Terminal Corp., 498 F.2d 641, 645 (5th Cir. 1974).

[23]Jackson v. Duke, 259 F.2d 3 (5th Cir. 1958).

[24]Donaldson v. O'Connor, 493 F.2d 507, 531 (5th Cir. 1974) *vacated on other grounds*, 422 U.S. 563 (1975).

[25]Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961).

[26]Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

[27]*Id.*

[28]42 U.S.C. § 2000e-5(e) (1976).

[29]421 U.S. at 462.

[30]*See* Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974).

[31]U.S. Const. amend. XIV, § 1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[32]*See, e.g.*, Beauregard v. Wingard, 230 F. Supp. 167, 177 (S.D. Cal. 1964).

[33]*Id.*

There are differences between section 1981 and Title VII which, depending upon one's strategy, make one or the other more useful as a means of redressing employment discrimination grievances. An individual who establishes a right to relief under section 1981 is entitled not only to equitable relief but also to legal relief, "including compensatory, and, under certain circumstances, punitive damages."[34] It has generally been held that under Title VII compensatory and punitive damages are not available.[35] In addition, back pay under section 1981 is not restricted to the two years specified under Title VII for back pay recovery.[36] Section 1981 does not, however, provide the coverage that Title VII does, even though Title VII is inapplicable to certain employers.[37] Title VII offers assistance in investigation,[38] conciliation,[39] counsel,[40] waiver of court costs,[41] and attorney fees,[42] items that are not specifically provided for under section 1981. Furthermore, the administrative procedure of filing a "Title VII charge and resort to Title VII's administrative machinery are not prerequisites for the institution of a § 1981 action."[43]

It has been argued that Title VII repealed section 1981.[44] There is, however, no language in Title VII directly repealing section 1981. Therefore, if such a repeal has taken place, it would have to have been by implication.[45] The test for repeal by implication was established in *Posadas v. National City Bank*:[46]

> There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . . .[47]

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[34]421 U.S. at 460.

[35]Loo v. Gerarge, 374 F. Supp. 1338, 1341-42 (D. Hawaii 1974).

[36]42 U.S.C. § 2000e-5(g) provides in part: "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."

[37]*Id.* § 2000e(b).

[38]*Id.* § 2000e-5(b).

[39]*Id.*

[40]*Id.* § 2000e-6.

[41]*Id.* § 2000e-5(k).

[42]*Id.*

[43]421 U.S. at 460.

[44]*See, e.g.*, Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

[45]*See* Posadas v. National City Bank, 296 U.S. 497 (1936).

[46]296 U.S. 497.

[47]*Id.* at 503.

In *Waters v. Wisconsin Steel Works of International Harvester Co.*,[48] the court held that the right to sue under section 1981 for racial discrimination in private employment existed prior to 1964 and that Congress did not repeal this right by enacting Title VII.[49] Congressional discussions of Title VII support the conclusion that it was not intended to supersede existing remedies.[50] In the Senate debates on Title VII, Senator Clark inserted into the Congressional Record three letters from jurists in support of Title VII, which thoroughly examined the existing federal remedies for discriminatory employment practices.[51] Congress must have intended to preserve other federal remedies, because the legislative history clearly reveals that it was aware of other remedies and did not repeal them.[52]

In *Alexander v. Gardner-Denver Co.*,[53] the Supreme Court emphasized that Title VII was designed to supplement existing laws pertaining to employment discrimination, rather than supplant them. The Court observed that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."[54] The Seventh Circuit in *Waters v. Wisconsin Steel Works of International Harvester Co.*,[55] followed the same logic by finding that an employment practice that passed the scrutiny of Title VII was not immune from attack under section 1981.[56] Thus, Title VII clearly does not cover the whole subject matter of section 1981, because Title VII's coverage of employers[57] is narrower than section 1981, which covers other contract rights besides employment.

Although courts may still have some apprehension about the impact of section 1981 on Title VII, any possible legal reasons for placing Title VII's procedural restrictions on actions brought under section 1981 are unsupportable in light of *Alexander*. In addition, any speculation regarding what Congress would have done if it had been

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[48]427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970).

[49]*Id.* at 485.

[50]110 CONG. REC. 13650-52 (1964). Senator Tower's suggestion that Title VII be made the exclusive federal remedy for employment discrimination was soundly defeated.

[51]*Id.* at 7207-12.

[52]*Id.* at 13650-52.

[53]415 U.S. 36 (1974).

[54]*Id.* at 48.

[55]502 F.2d 1309 (7th Cir. 1974) (appealing decision on remand from 427 F.2d 476), *cert. denied*, 425 U.S. 997 (1976).

[56]502 F.2d at 1317-20.

[57]42 U.S.C. § 2000e(b) (1976). This section excludes certain employers from the requirements of Title VII.

aware of section 1981 rights deviates from the "clear and manifest intent to repeal" test of repeal by implication stated in *Posadas*.[58]

IV. Cases Brought Under Sections 1981 and 1983

The following discussion indicates that between 1964 and 1972 courts in actions in which plaintiffs claimed employment-based civil rights violations under sections 1981 and 1983 used Title VII standards to adjudicate the claims. Title VII standards allowed a plaintiff to establish a *prima facie* case of employment discrimination by showing that an employment procedure excluded blacks from hiring or promotional opportunities at a higher rate than it did whites.[59] Although this *prima facie* case could be rebutted by an employer establishing that an employment procedure was related to the skills required for the job,[60] it is important to remember that Title VII requires no discriminatory intent on the part of the employer in order for the employer to be liable for employment discrimination.[61] The courts in the cases that follow, with the exception of the Supreme Court case of *Washington v. Davis*,[62] never address the constitutional issue of whether the employment practices challenged violated the equal protection clause of the fourteenth amendment, which reuqires a showing of discriminatory intent.[63] The use of Title VII standards in adjudicating section 1981 and 1983 actions were effective in curtailing the effect of discriminatory employment practices.[64]

In *Commonwealth of Pennsylvania v. O'Neill*,[65] several black prospective and incumbent police officers brought a suit alleging that the Philadelphia Police Department's hiring and promotion practices discriminated against blacks.[66] The police department required applicants to undergo a written examination, a physical and psychiatric examination, a background investigation, and an oral evaluation.[67] The three elements considered for promotion to lieutenant were a written examination, seniroity, and the supervisor's performance rating. The criteria for promotion to ranks higher than

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[56]*See* 296 U.S. at 503.

[59]Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[60]Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[61]*Id.* at 432.

[62]426 U.S. 229 (1976).

[63]*Id.* at 239-40.

[64]*See, e.g.*, Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). However, in any class action suit challenging racially discriminatory employment practices the latent issue is the need for black representation. It is this latent issue that the courts in section 1981 and 1983 actions did not adequately address or were incapable of addressing.

[65]348 F. Supp. 1084 (E.D. Pa. 1972), *modified*, 473 F.2d 1029 (3d Cir. 1973).

[66]348 F. Supp. at 1086.

[67]*Id.* at 1087.

lieutenant included these elements and an oral examination.[68] The black prospective and incumbent police officers alleged that the written examinations and the entry-level background investigation violated their civil rights under sections 1981 and 1983.[69]

The defendants in *O'Neill* presented evidence that the entrance examination was predictive of performance in the training program for police officers.[70] The court rejected such evidence under the premise that in order for an examination to justify a discriminatory effect it had to be related to the skills required for the occupation.[71] Although *O'Neill* was not brought under Title VII and *Griggs v. Duke Power Co.*[72] was decided prior to Title VII's application to public employment, the district court in *O'Neill* held that the standards of Title VII and the Equal Employment Opportunity Commission's (E.E.O.C.) guidelines used by the Supreme Court in *Griggs* "provided 'persuasive analogy' for the decision of similar questions involving public employment."[73] In essence, the district court used the job-relatedness standard that *Griggs* held was to be applied under Title VII[74] as the standard in actions brought under sections 1981 and 1983. Using the standards approved by *Griggs*, the district court allowed the aggrieved blacks to make a *prima facie* case of discrimination by establishing the discriminatory impact[75] of the examination, regardless of an employer's intent.[76]

Although the job-relatedness of an employement test was the standard, the district court in *O'Neill* stated that if the entrance examination was job-related and yet a poor examination in that it rewarded test-taking ability and examined inappropriate subject matter, the court could require the "defendants to devise the least discriminatory test possible."[77] A similar conclusion with respect to the use of less discriminatory alternatives was reached in *Castro v. Beecher*,[78] another police department employment discrimination action in which the plaintiffs alleged violation of civil rights under sections 1981 and 1983.

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[68]*Id.*

[69]Pennsylvania v. O'Neill, 473 F.2d 1029, 1030 (3d Cir. 1973).

[70]348 F. Supp. at 1090.

[71]*Id.* at 1090-91. The court held that the examination was not job-related in that it was not related to the skill necessary for adequate job performance. *Id.*

[72]401 U.S. 424 (1971). This case interpreting Title VII was decided before Title VII's application to public employment.

[73]348 F. Supp. at 1103.

[74]401 U.S. at 432.

[75]Discriminatory impact is established when an employment qualification excludes blacks at a higher rate than whites. *Id.* at 431-32.

[76]348 F. Supp. at 1102-05.

[77]*Id.* at 1091.

[78]459 F.2d 725, 733 (1st Cir. 1972).

With respect to the background check, the district court in *O'Neill* admitted evidence that established that the check excluded a greater percentage of black applicants than white applicants.[79] The court stated that even if the background check was administered in an unbiased manner the factors relied upon had the effect of disproportionately eliminating black applicants. For example "[i]llicit or [i]mmoral [c]onduct" was attributed to 29.4% of the black applicants while it was attributed to only 9.7% of the white applicants.[80] Again, the district court used the *Griggs* standards of analyzing employment practices by concentrating on the adverse racial impact of an employment practice, instead of the discriminatory intent of an employer.[81] By requiring that employment practices be job-related in actions alleging civil rights violations under sections 1981 and 1983, the *O'Neill* court at least enhanced the possibility of increased black representation by eliminating procedures that unfairly excluded blacks.

Although the district court's opinion in *O'Neill* was eventually modified,[82] the district court made an interesting observation that is often overlooked in cases involving employment discrimination against blacks. The district court stated that "[c]ontinued use of hiring and promotion practices which discriminate against blacks necessarily causes irreparable injury to those discriminated against, as well as to the public at large."[83] In addition, the district court stated:

> Requiring that hiring and promotion in the Police Department be done on a basis which does not discriminate against blacks except for reasons related to job performance does not imply a "lowering of standards," but rather an improvement of standards to make certain that they accurately determine, on a non-discriminatory basis, who is and who is not qualified.[84]

Unfortunately, the truth of these two observations is often overlooked when hiring and promotion practices that have been used by police departments for a period of time are ordered to be changed.

In *Castro v. Beecher*, a 1971 employment discrimination action

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[79]348 F. Supp. at 1095. After the background check, similarly-situated applicants were not treated the same in that white applicants were rejected at a rate of 26.8% while black applicants were rejected at the rate of 53.7%. *Id.* at 1096.

[80]*Id.* at 1100.

[81]*Id.* at 1102.

[82]473 F.2d at 1031. The court of appeals affirmed the portion of the district court's opinion pertaining to hiring procedures. *Id.*

[83]348 F. Supp. at 1102.

[84]*Id.* at 1103.

in which the plaintiffs claimed violations of their civil rights under sections 1981 and 1983,[85] the Boston Police Department's recruiting and hiring practices were alleged to be discriminatory against Spanish-surnamed and black applicants.[86] In particular, the grievances pertained to the discrimination in disseminating information concerning employment opportunities,[87] a discriminatory educational requirement,[88] a discriminatory written examination,[89] a discriminatory height requirement, and a discriminatory swimming test.[90] The court in *Castro* followed *Griggs* and *O'Neill* by requiring a showing of substantial relation to job performance in order to justify an employment practice that had a *racially disproportionate impact*.[91] By accepting the standards set forth in *Griggs*, the *Castro* court, like the *O'Neill* court, required no showing of discriminatory intent on the part of the employer for persons seeking redress for employment discrimination under sections 1981 and 1983.

The plaintiffs in *Castro* did not, however, show that the minimum height requirement had a disproportionate impact on Spanish-surnamed persons. Thus, the court held it was permissible.[92] The court stated that absent "a showing of prima facie discriminatory impact, the standard of review is . . . a relaxed one, which a minimum height requirement for policemen clearly meets."[93] Under the standards set forth in *Castro*, if the plaintiffs had shown that the minimum height requirement had a discriminatory effect, the defendant could then have rebutted this evidence by establishing that the height requirement was job-related.[94] The plaintiffs then would have had the burden of showing that there was another screening device or standard that was adequate and less discriminatory.[95] Although *Castro* provided no basis to argue for the elimination of height requirements for police departments altogether, it appears that the court would have been willing to require height requirements to be job-related in actions brought under sections 1981 and 1983, once adverse racial impact was ascertained.

In *Castro* it was not established that the swimming test had a disproportionate impact upon black applicants, but the court stated

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[85]459 F.2d at 728.
[86]*Id.*
[87]*Id.*
[88]*Id.* at 735.
[89]*Id.* 728.
[90]*Id.*
[91]*Id.* at 732 (emphasis added).
[92]*Id.* at 734.
[93]*Id.*
[94]*Id.* at 732.
[95]*Id.* at 733.

that if such impact had been shown a "heavy burden" would have been placed on the defendants to justify the test.[96] This language would indicate that even the requirement of a swimming test in an action brought under sections 1981 and 1983 would be evaluated by the job-relatedness standard of Title VII.

In reference to the educational requirement in *Castro* that applicants possess either a degree from high school, a certificate of equivalency, or an honorable discharge after three years of military service, the court stated that it lacked evidence indicating the extent to which blacks met one of the alternative requirements.[97] The court stated that the educational requirement was supported by job-relatedness standards, but it referred not to any validation study performed by the defendant but to reports by national commissions on law enforcement or civil disorders.[98] This type of validation of educational requirements is not supported by *Griggs*.[99] "Congress has placed on the *employer* the burden of showing that any . . . requirement must have a manifest relationship to the employment in question."[100] The court in *Castro* concealed its public policy determination that educational requirements would not be tampered with, by holding that the educational requirement was job-related. A policy determination such as the one made by the *Castro* court undermines any adverse racial impact analysis, because it exempts from proper scrutiny a requirement that may exclude a large percentage of blacks, without the police department having to justify that requirement. At least with respect to educational requirements, the *Castro* court, in an action claiming civil rights violations under sections 1981 and 1983, departed from the job-relatedness requirement of Title VII.

Even though the promotion examination in *Castro* was shown to have an adverse impact on blacks, the court stated that the plaintiffs did not prove that all the factors on the examination were not job-related.[101] Consequently, the court held that the eligibility lists based on the examination were valid, even if the examination discriminated against blacks.[102] It is odd that the court would hold the examination to be valid and yet agree with the district court

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[96]*Id.* at 734.

[97]*Id.* at 735.

[98]*Id.* The reports emphasized the need for police officers to have at least some college experience.

[99]401 U.S. at 433-34. The Supreme Court required that an employment qualification be validated by E.E.O.C. standards. *Id.*

[100]*Id.* at 432 (emphasis added).

[101]459 F.2d at 736.

[102]*Id.*

that new examinations had to be developed.[103] In other words, the *Castro* court decided that it would not require those made eligible by an examination that was partially valid and partially invalid under job-relatedness standards to take a new examination. A decision such as this seems to be more concerned with the status of whites whose promotional opportunities have been increased by a biased examination instead of those whose opportunities have been denied by the examination. Again, the requirement that a new examination be developed does eliminate or at least minimize discriminatory practices. However, it is neither a long-term nor short-term guarantee for black representation. It increases the possibility for black representation, but it is an inadequate solution to a very complex problem.

Allen v. City of Mobile,[104] a 1971 case pertaining to discriminatory police employment practices, addressed many of the issues presented in *Castro*. The sergeant's promotion test was held to be *reasonably* job-related after evidence of adverse racial impact was submitted.[105] Only 14.3% of the blacks passed the sergeant's examination while 60.6% of the whites passed the same examination.[106] The three other factors considered for promotion besides the written examination were seniority, regular service ratings, and special service ratings.[107] The police department's seniority system, which was based on total years in grade rather than years in service,[108] was held to be racially discriminatory against blacks,[109] because blacks were not hired into the police department until 1954 and thus could not have earned the points necessary to assist in promotion.[110] In determining whether an employment practice was discriminatory, the court considered the past behavior of the police department that perpetuated the effect of past discriminatory practices.[111] As for the regular service ratings and the special service ratings, the court held the first to be non-discriminatory but indicated that the latter may have had a racially discriminatory effect.[112]

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[103]*Id.* at 737.

[104]331 F. Supp. 1134 (S.D. Ala. 1971), *aff'd*, 466 F.2d 122 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973), *modified*, 464 F. Supp. 433 (S.D. Ala. 1978) (The court evaluated issues presented under Title VII instead of under sections 1981 and 1983).

[105]331 F. Supp. at 1146.

[106]*Id.* at 1141.

[107]*Id.* at 1139.

[108]*Id.* at 1142.

[109]*Id.* at 1143.

[110]*Id.* at 1142.

[111]*Id.*

[112]*Id.* at 1148.

On appeal, the Fifth Circuit affirmed the district court opinion in *Allen*,[113] but the dissent by Judge Goldberg pertaining to the evaluation of examinations deserves comment. Judge Goldberg stated that objective examinations, which were to replace subjective discriminatory practices, often contain more subtle forms of discrimination.[114] "[A] test can be impeccably 'objective' in the manner in which the questions are asked, the test administered, and the answers graded, and still be grossly 'subjective' in the educational or social milieu in which the test is set."[115] Often this is overlooked by the judiciary when analyzing racial discrimination. Examinations that are job-related may nevertheless be culturally biased and may deny black applicants equal opportunity. Judge Goldberg indirectly presented the problem that the requirement of job-related examinations may still be insufficient to guarantee equal opportunity. In addition, Judge Goldberg stated that to merely require a test to be rationally job-related was inappropriate, because there had been a long standing practice of giving preference to whites.[116] The police department should have been required to prove that the test bore *a manifest relationship* to the police sergeant position,[117] because virtually any test could somehow be rationally related to a police sergeant's functions.[118] Judge Goldberg's position regarding the degree of proof necessary to justify the continuation of a test that has a discriminatory impact is consistent with the position taken by the First Circuit in *Castro*[119] and the Supreme Court in *Griggs*.[120]

The *Castro* court and the *Allen* court have imposed two different burdens of proof for validating an examination when an employment discrimination action is brought under sections 1981 and 1983. Although the *Castro* court required a demonstration of a "compelling interest" by police departments to continue an employment practice that had a discriminatory effect,[121] the *Allen* court required only rational job-relatedness of a test that had a discriminatory effect.[122] From the standpoint of blacks seeking to redress employment grieveances, the *Castro* precedent offers greater

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[113]466 F.2d at 122.

[114]*Id.* at 123 (Goldberg, J., dissenting).

[115]*Id.*

[116]*Id.* at 126.

[117]*Id.*

[118]*Id.*

[119]459 F.2d at 733.

[120]401 U.S. at 431. *Griggs* was brought under Title VII rather than sections 1981 and 1983. *See* text accompanying notes 179-85 *infra*.

[121]459 F.2d at 733.

[122]331 F. Supp. at 1146.

opportunity to eliminate discriminatory institutional barriers. For public policy reasons, such as the recognition by the judicial branch of the difficulty for parties to prove intentional discrimination[123] and the need to redress the grievances of a people entrenched in a history of racial subordination, the *Castro* court placed a justified burden on police departments to produce compelling reason for the continuation of a practice that has a discriminatory effect.

In 1976 the Supreme Court seemingly resolved the question of whether an aggrieved party merely had to prove adverse racial impact instead of intentional discrimination to establish employer liability under section 1981.[124] In *Washington v. Davis*,[125] black police officers filed an action claiming that the employment and promotional policies of the District of Columbia Metropolitan Police Department were racially discriminatory and thus violated both section 1981 and the due process clause of the fifth amendment.[126] At issue was Test 21, a test developed by the Civil Service Commission. Police department applicants were required to score at least forty points out of eighty on Test 21 in order to be accepted into the District of Columbia Police Department.[127] Test 21 excluded a greater percentage of blacks than whites from the employment process.[128] The Court held that the constitutional standard for adjudicating claims of invidious racial discrimination is not identical to the standards applicable under Title VII and that employment practices are not unconstitutional because they have a racially adverse impact.[129] In essence, "the invidious quality of a law claimed to be racially discriminatory must . . . be traced to a racially discriminatory purpose."[130] Furthermore, the Court stated that "we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of laws' simply because a greater proportion of [blacks] fail to qualify than members of other racial or ethnic groups."[131] The Supreme Court ultimately found that Test 21 was job-related under Title VII.[132]

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[123]*See* Griggs v. Duke Power Co., 401 U.S. 424, 429-33 (1971) (under Title VII an aggrieved party must merely show discriminatory impact of an employment procedure, not the discriminatory intent of an employer).

[124]*See* Washington v. Davis, 426 U.S. 229 (1976).

[125]*See id.*

[126]*Id.* at 232-33.

[127]*Id.* at 234.

[128]*Id.* at 235-37. Four times as many blacks as whites failed the examination. *Id.*

[129]*Id.* at 239.

[130]*Id.* at 240.

[131]*Id.* at 245.

[132]*Id.* at 249-50.

The Supreme Court in *Washington* analyzed Test 21 under 5 U.S.C. section 3304,[133] which provides that "examinations for testing applicants for appointment . . . [must] . . . as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointments sought."[134] In interpreting the Civil Service Commission regulations, the Court further stated that "Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the [test], wholly aside from its possible relationship to actual performance as a police officer."[135]

Justice Brennan's dissent in *Washington* presented several points that questioned the wisdom of the majority's opinion. For one, the majority's focus on 5 U.S.C. section 3304 standards to the exclusion of Title VII standards with respect to the job-relatedness of an employment test was incorrect, because the Civil Service Commission considered both standards identical.[136] According to Justice Brennan, even if Test 21 was predictive of recruit school final averages, the final averages were not appropriate to use in evaluating the training program or establishing a relationship between the recruit school program and the job of a police officer.[137] Under Justice Brennan's analysis, a test that has a discriminatory impact must be job-related irrespective of the intent of the employer.[138]

The Supreme Court's decision in *Washington* should not be viewed as a preclusion of the application of Title VII standards, including the discriminatory impact analysis, to actions brought under section 1981. *Washington* addressed the constitutional issue of whether discriminatory impact was sufficient to create a *prima facie* case of employer discrimination under the fifth and fourteenth amendments. The Supreme Court in *Washington* did not address the statutory issue of whether discriminatory impact analysis could be used under section 1981.

Davis v. County of Los Angeles[139] was a 1977 class action suit by black and Mexican-American fire fighters alleging employment discrimination in violation of the fourteenth amendment, sections 1981 and 1983, and Title VII.[140] The Ninth Circuit in *Davis* stated that it

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[133]5 U.S.C. § 3304 (1976).

[134]*Id.* § 3304(a)(1).

[135]426 U.S. at 250.

[136]*Id.* at 258 & n.2 (Brennan, J., dissenting).

[137]*Id.* at 262-63.

[138]*Id.* at 270.

[139]566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

[140]566 F.2d at 1336.

had been an established practice to use Title VII standards for adjudicating claims of employment discrimination under section 1981.[141] The court stated "[i]n absence of any express pronouncement from the Supreme Court—a pronouncement not delivered in *Washington*—we are unwilling to deviate from this established practice."[142] Moreover, the *Davis* court saw "no operational distinction . . . between liability based under Title VII and section 1981."[143] Throughout the text of *Washington* the Court's discussion was of "constitutional standards" and "constitutional based" claims.[144] The Supreme Court in *Washington* never mentioned section 1981 as requiring discriminatory intent on the part of an employer. "Nor can it be said that in resolving the equal protection question before it, the [*Washington*] Court necessarily resolve the § 1981 claim on the same basis."[145] Although the Supreme Court eventually vacated the Ninth Circuit's decision in *Davis*,[146] the decision was vacated because the controversy in the case had become moot.[147] The Supreme Court in *Davis* did not address the issue of whether the discriminatory impact of an employment procedure created a *prima facie* case of discrimination under section 1981.[148] The Supreme Court did state, however, that the Ninth Circuit's decision, because it was vacated, had no precedential value.[149]

Although *Washington* suggested, because it was partly a section 1981 action, that the discriminatory impact analysis of Title VII may not be used for section 1981 actions, it did not specifically hold so. The latest word from the Supreme Court in *Davis* indicates that the court has not decided the issue. Thus, until the Supreme Court rules on the issue, authority exists for using Title VII standards, including the discriminatory impact analysis, to adjudicate actions brought pursuant to section 1981. There have been, however, cases since *Washington* that have held that discriminatory intent is required under section 1981.[150]

In summary, the burden of proof required to prove discrimination in actions brought under sections 1981 and 1983 is by no means

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[141]*Id.* at 1340.

[142]*Id.*

[143]*Id.*

[144]426 U.S. at 229-52.

[145]Davis v. County of Los Angeles, 566 F.2d at 1340.

[146]440 U.S. at 634.

[147]*Id.*

[148]*Id.* at 627, 634.

[149]*Id.* at 634 n.6.

[150]*See, e.g.*, City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976); Croker v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977) (section 1981 requires a plaintiff to establish discriminatory intent); Johnson v. Hoffman, 424 F. Supp. 490 (E.D. Mo. 1977) (racially disparate impact does not violate § 1981).

light. Although the *Castro* court, the *O'Neill* court, and the *Allen* court allowed a *prima facie* case of discrimination to be established under section 1981 by a showing of adverse impact, the Supreme Court's decision in *Washington* may preclude such an analysis.[151] *Davis*, on the other hand, indicated that the Supreme Court has not decided whether Title VII standards may be used for adjudicating actions brought pursuant to section 1981.

V. Title VII: Legislative History and Case Law

A. Legislative History

In order for Title VII to be effective as a means to increase black representation within urban police departments, the use of race as part of the employment criteria is necessary. The legislative history of Title VII as amended indicates that Congress did not intend to prohibit the use of race by courts in fashioning remedies to redress employment grievances.[152]

When Title VII of the Civil Rights Act of 1964 was being proposed, some members of Congress feared that it would be interpreted to require quotas in order to maintain racial balance in a work force.[153] In response, sponsors of the Act stated that this was not the intent of the bill nor would it be the effect of the statute.[154] These assurances, however, should not be viewed as indicating that Title VII was intended to prohibit the use of race in making employment decisions. Rather, the assurances should merely be viewed as a clarification that employers would only be required to establish racial quotas when the type of discrimination prohibited by Title VII was established.[155]

Two provisions in Title VII exemplify the congressional concerns about its scope.[156] Section 706(g)[157] prevents courts from ordering relief under the authority of Title VII when the employer's

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[151]426 U.S. at 240.

[152]*See* 118 Cong. Rec. 1664-65, 1675-76 (1972); H.R. Rep. No. 238, 92d Cong., lst Sess. 16 (1971). Furthermore, the amendments that were introduced in both the House and the Senate that would have prohibited federal agencies from ordering the use of numerical ratios in hiring were defeated. 118 Cong. Rec. 1676, 4918 (1972); 117 Cong. Rec. 32111 (1971).

[153]*See, e.g.*, 110 Cong. Rec. 5877-78 (1964) (remarks of Sen. Byrd); *id.* at 7774, 7778 (remarks of Sen. Tower).

[154]*Id.* at 6549 (remarks of Sen. Humphrey); *id.* at 6563 (remarks of Sen. Kuchel).

[155]*Id.* at 6549, 7214.

[156]Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 447-57 (1966).

[157]42 U.S.C. § 2000e-5(g) (1976) (section 706(g) of the Civil Rights Act of 1964).

actions against employees or applicants were not in vilation ot Title VII. Section 703(j) states that preferential hiring cannot be required to attain a racial balance.[158] Section 703(j) does not, however, prevent the use of racial classification to rectify past discrimination.[159]

In spite of the Civil Rights Act of 1964, employment discrimination persisted. Therefore, Congress addressed the issue again in the 1972 amendments to Title VII.[160] The 1972 amendments clarified the issue of whether courts could use race-conscious remedies.[161] The amendments brought previously excluded employers within the scope of Title VII[162] and confirmed the authority of federal courts to order race-conscious numerical relief.[163]

Even before the 1972 amendments, federal courts had ordered race-conscious remedies for unlawful discrimination.[164] In *United States v. IBEW Local 38*,[165] the court stated that the preclusion of race-conscious remedies "would allow complete nullification of the stated purposes of the Civil Rights Act of 1964."[166] Congress was well aware of federal courts using numerical relief to enforce Title VII when the 1972 amendments were presented.[167] Both amendments introduced to restrict federal courts from instituting numerical ratios were defeated.[168] Senator Javits stated that the amendment

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[158]*Id.* Section 2000e-2(j) (section 703(j) of the Civil Rights Act of 1964) provides that an employer is not required by Title VII "to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by [the] employer."

[159]*See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 n.20, 374 n.61 (1977); Carter v. Gallagher, 452 F.2d 315, 329 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[160]*See* S. REP. NO. 92-415, 92d Cong., 1st Sess. (1971); H.R. REP. NO. 92-238, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137-79.

[161]*See* note 152 *supra*. Congress was aware that courts had ordered numerical relief under Title VII but it understood that if the 1972 amendments to the Civil Rights Act of 1964 did not change the law, "the present case law . . . would continue to govern the applicability and construction of Title VII." 118 CONG. REC. 7166 (1972). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 353 n.28 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 753 (1975).

[162]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2(1)-(3), 86 Stat. 103 (1972) (amending 42 U.S.C. 2000e (1970)).

[163]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104 (1972) (amending 42 U.S.C. 2000e-5(a) to (g) (1970)).

[164]*See, e.g.*, United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insul. Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[165]428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

[166]*Id.* at 149-50.

[167]*See* S. REP. NO. 92-415, *supra* note 160, at 21; H.R. REP. NO. 92-238, *supra* note 160, at 8, 13; 118 CONG. REC. 1664-76 (1972).

[168]*See* 117 CONG. REC. 32111 (1971); 118 CONG. REC. 1676, 4918 (1972).

restricting the use of numerical ratios would terminate "the whole concept of 'affirmative action' as it has been developed . . . as a remedial concept under Title VII."[169] In reference to courts allowing numerical relief under Title VII, Senator Javits stated:

> [T]he amendment[s] . . . would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the effort to correct these injustices.[170]

In addition, Senator Williams stated that a preclusion of numerical relief "would strip Title VII . . . of all its basic fiber."[171]

Instead of placing restrictions on the remedial authority of the courts, Congress amended section 706(g) to add remedies and empower courts to order "any other equitable relief as [they] deem appropriate."[172] Thus, courts have a "wide discretion in exercising their equitable powers to fashion the most complete relief possible."[173] From the legislative history provided, Congress must have viewed race-conscious relief as an appropriate remedy under Title VII to redress employment discrimination grievances.

Congress displayed some apprehension that Title VII would prohibit the testing of employees and require employers to hire unqualified people who were in the past subject to discrimination.[174] This misapprehension was eliminated by Senators Case of New Jersey and Clark of Pennsylvania in a memorandum explaining that employees had to have the proper job qualifications and that Title VII was intended to promote hiring on job qualifications, not race or color.[175] Although an amendment was presented that required merely a professionally developed ability test, that amendment was defeated, because it left no room to evaluate the quality of such a test.[176] Section 703(h)[177] eventually became the testing provision, and it generally was considered to be in accord with the content and

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[169]118 CONG. REC. 1664 (1972).

[170]*Id.* at 1665.

[171]*Id.* at 1676.

[172]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a) (1972).

[173]118 CONG. REC. 7168 (1972).

[174]110 CONG. REC. 5614-16 (1964) (Sen. Ervin); *id.* at 5999-6000 (Sen. Smathers); *id.* at 9025-26 (Sen. Talmadge).

[175]*Id.* at 7247.

[176]*Id.* at 13504.

[177]42 U.S.C. § 2000e-2(h) (1976) provides: "[I]t [shall not] be an unlawful employment practice to give . . . [a] professionally developed ability test provided that such test . . . [is] not designed, intended or used to discriminate because of race, color, religion, . . . or national origin."

purpose of Title VII.[178] Thus, Congress was definitely concerned that employment tests be unbiased, even though it did not set forth detailed criteria for evaluating such tests.

B. Cases Brought Under Title VII

The standards to be used in litigation under Title VII were provided by the Supreme Court in *Griggs v. Duke Power Co.*[179] and *Albemarle Paper Co. v. Moody.*[180] *Griggs* held that an examination for employment or promotion that had an adverse racial impact on black applicants was a violation of Title VII, unless it was job-related. The Supreme Court stated that "[t]he Act [prohibits] not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [blacks] cannot be shown to be related to job performance, the practice is prohibited."[181]

A *prima facie* case of discrimination is established if evidence indicates that an examination "select[s] applicants for hire or promotion in a racial pattern . . . different from that of the pool of applicants."[182] Once a *prima facie* case is established, the employer must show that the employment requirement is job-related and that the disparity is not the result of discrimination.[183] Employers are required to prove the job-relatedness of an examination by validation in accordance with E.E.O.C. guidelines and the professional standards of the American Psychological Association.[184] The Supreme Court in *Griggs* stated that the E.E.O.C. guidelines are entitled to great deference when evaluating the job-relatedness of an examination.[185] Even if the employer establishes that an examination is job-related, the examination may be found to violate Title VII, if the grievant can show that the employer's purposes would be equally served by an examination that would not have a disparate racial impact.[186] These standards are the ones used in police employment discrimination actions brought under Title VII.

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[178]110 CONG. REC. 13724 (1964).

[179]401 U.S. 424 (1971).

[180]422 U.S. 405 (1975).

[181]401 U.S. at 431.

[182]422 U.S. at 425.

[183]401 U.S. at 432.

[184]*See, e.g.*, Douglas v. Hampton, 512 F.2d 976, 986 (D.C. Cir. 1975); United States v. Georgia Power Co., 474 F.2d 906, 913 (5th Cir. 1973).

[185]401 U.S. at 433-34.

[186]422 U.S. at 425.

Title VII has only minimally increased the number of blacks in urban police departments.[187] Court actions and the remedies that follow are often short-term solutions to long-term problems.[188] The judiciary is limited to the extent it can continually oversee police employment practices. In *United States v. City of Buffalo*,[189] an action was brought under Title VII challenging the city's written examination, height requirement, high school diploma requirement and several other hiring requirements.[190] Applicants were required to score seventy percent on the patrolman's examination in order to pass. Forty-three percent of the white applicants received a passing score, while eight percent of the black applicants received a passing score.[191]

Title VII has been interpreted to require an examination to withstand either criteria validation, a statistical comparison between the test performance and job performance, or content validation, which requires that the content of the test represent important aspects of the job.[192] However, Title VII does not prevent an examination that is job-related from being held to be an inappropriate employment practice, if the examination eliminates a great percentage of blacks from the employment pool. Although the examination in *City of Buffalo* was held to be in violation of Title VII,[193] the requirement of a new job-related examination was directed toward eliminating biased practices, and not increasing black participation.[194]

Because an examination can be challenged and held invalid on the basis of adverse racial impact, the minimization of adverse impact should be part of the criteria that validates an examination. The requirement of a new examination in *City of Buffalo* was truly

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[187]*See, e.g.*, Pennsylvania v. O'Neill, 348 F. Supp. 1084 (E.D. Pa. 1972), *modified*, 473 F.2d 1029 (3d Cir. 1973). The percentage of blacks hired by the Philadelphia Police Department from 1966 to 1970 decreased each year, from a high of 27.5% in 1966 to a low of 7.7% in 1970. In addition, the proportion of black police officers on the Philadelphia police force decreased each year during the period of 1967 to 1971, from a high of 20.8% in 1967 to a low of 18.0% in 1971. 348 F. Supp. at 1087.

[188]*See, e.g.*, United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977). The racial quotas that the lower court established for hiring were in a short time suspended to allow the appointment of officers from a new roster of candidates which had been derived from a restructured examination. 549 F.2d at 436 n.29. Quotas must be considered short term relief unless they are based on the percentage of blacks in the area population and are perpetual.

[189]457 F. Supp. 612 (W.D.N.Y. 1978).

[190]*Id.* at 617-18.

[191]*Id.* at 622.

[192]*Id.* at 622-23.

[193]*Id.* at 624.

[194]*Id.* at 623.

indicative of the inability of courts to secure employment changes that have a long-term effect. A requirement of a new examination does not directly address the basic need of increasing black representation.

The district court in *City of Buffalo* held that the high school diploma requirement was job-related.[195] Yet the court stated that the standard to be applied to a high school diploma requirement was not as stringent as the standard applied to an examination.[196] "[A] high school education is a bare minimum requirement for successful performance of the policeman's responsibilities."[197] The court's decision, with respect to the educational requirement, was embedded more in public policy than in Title VII standards of evaluation. *Griggs* did not allow a lesser standard for the evaluation of an educational requirement.[198] By not evaluating the educational requirement by the job-relatedness standard, the district court was in conflict with *Griggs*, which requires any employment requirement to bear a "*manifest* relationship to the employment in question."[199] The *Griggs* mandate was not limited to examinations. A failure to use the job-relatedness standard for all employment qualifications weakens Title VII to a great degree, because educational requirements may disproportionately exclude black applicants. To emphasize a need both for police officers with certain educational requirements and black police officers, without realizing that the educational requirement might restrict the possibility of increasing black participation, is to be insensitive to the character of racialism and the dependency relationships between the racialist denial of educational opportunity and occupational opportunity. Moreover, even if the *City of Buffalo* court truly applied the job-relatedness standard of *Griggs* to the educational requirement, the standard of job-relatedness is inadequate to evaluate employment qualifications.

The case that best exemplifies employment discrimination actions brought against urban police departments is *United States v. City of Chicago*,[200] a 1976 consolidated civil rights action challenging the employment procedures of the Chicago Police Department.[201] In *City of Chicago*, a patrolman's examination was invalidated after it

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[195]*Id.* at 624. Though the high school diploma requirement was found to be related to the job of patrolman, the court found that there was no relation between the high school diploma requirement and the job of firefighter. *Id.* (citing Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975)).

[196]457 F. Supp. at 629.

[197]*Id.*

[198]401 U.S. at 432.

[199]*Id.* at 432 (emphasis added).

[200]549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

[201]*Id.* at 420.

was found that blacks failed the examination at twice the rate of white applicants.[202] A background investigation, under which 25.7% of the black applicants since 1962 were disqualified while only 15.2% of the white applicants within the same time frame were disqualified,[203] was also invalidated.[204] In addition, the circuit court affirmed the district court's finding that the promotional examination for police sergeant had an adverse racial impact on minorities because only "2.23 percent of minority candidates taking the examination had a practical chance of being promoted compared to a 7.07 percent of the white candidates."[205]

The defendants in *City of Chicago* attempted to validate the patrolman's examination with criteria validation, which consisted of a comparison between success on the examination and patrolman efficiency ratings, departmental awards, disciplinary action, performance on the sergeant's promotion examination, and promotion to command ranks.[206] The court, however, affirmed the district court's holding that the evidence did not satisfy E.E.O.C. guidelines[207] for criteria validation.[208] Promotion can only be used as a criterion for validation of an employment test when a substantial number of employees can expect promotion within a reasonable time,[209] and in *City of Chicago*, a substantial number of employees could not expect promotion within a reasonable time.[210] Though requiring content or criteria validation assists in eliminating discriminatory employment practices, the fundamental problem of black unemployment or black underrepresentation is not directly addressed by these types of validation. Perhaps a requirement of statistical racial parity

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[202] *Id.* at 428. Black applicants failed the examination at a rate of 67% while only 33% of the white applicants failed. *Id.* at 428 n.11.

[203] *Id.* at 428.

[204] *Id.* at 427.

[205] *Id.* at 429.

[206] *Id.* at 430.

[207] 29 C.F.R. § 1607.5(C) (1980) provides:

> *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974) . . . and standard textbooks and journals in the field of personnel selection.

[208] 549 F.2d at 430.

[209] *Id.* at 430-31; Albemarle Paper Co. v. Moody, 422 U.S. 405, 434 (1975); 29 C.F.R. § 1607.4(C) (1980).

[210] 549 F.2d at 431.

validation[211] may be necessary to promptly confront the issue of black underrepresentation within urban police departments. Although black underrepresentation may be the symptom of discriminatory employment practices, this is one occasion in which the symptom must be directly addressed if one is to redress employment discrimination grievances.

In *City of Chicago*, the 1973 sergeant's examination was held not to be job-related.[212] The circuit court stated that an examination had to be validated for both minorities and whites.[213] An employer who uses a test that has an adverse racial impact on blacks must show that the test is predictive of black and white job performance, and that the exclusion of blacks is because of deficiencies in their job qualifications.[214] The Supreme Court in *Albemarle Paper Co. v. Moody*[215] accepted the above E.E.O.C. standards[216] requiring black and white validation of an examination. These standards, however, are inadequate, because they do not necessarily provide redress for job-related or job predictive examinations that have an adverse racial impact.

The remedies that courts fashion under Title VII to redress the grievances of blacks within or attempting to enter the police field are grossly inadequate to increase or maintain black representation. Judicial quotas are often short-term or cosmetic solutions to black underrepresentation. Indeed, the judiciary may be the branch least capable of increasing black representation. In *City of Chicago*, the circuit court affirmed the district court's relief order that black or Spanish-surnamed people must fill forty-two percent of future patrol officer vacancies.[217] This hiring requirement cannot be viewed as a long-term method to increase black participation, because it was based on a finding of past discriminatory employment practices by the employer and was in a short time suspended.[218] In addition, the remedy was fashioned to eradicate the past efforts of discrimination and prevent discrimination in the future.[219] Perhaps the most

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[211]Statistical racial parity validation would require that an examination, even if job-related, must eliminate whites from the hiring or promotion process at the same rate in which it eliminates blacks in order for the examination to be maintained as an employment qualification.

[212]*Id.* at 433-34.

[213]*Id.* at 433.

[214]*Id.*

[215]422 U.S. 405, 435-36 (1975).

[216]29 C.F.R. § 1607.5(b) (1975) (now contained in scattered sections of E.E.O.C., Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1980)).

[217]549 F.2d at 436.

[218]*Id.* at 436 n.29.

[219]*Id.* at 436.

effective way to prevent future discrimination is a requirement of black representation.

The *City of Chicago* court also ordered that forty percent of the patrol officers promoted to the position of sergeant be black or Spanish-surnamed.[220] Several circuit courts have allowed the use of mandatory racial quotas as a proper exercise of a court's remedial powers under Title VII.[221] Though quotas such as the ones used in *City of Chicago* may have an immediate effect on the composition of a police department, judicial quotas do not provide a long-term means to guarantee black representation on police forces, because they are, in addition to other difficulties mentioned, dependent upon a judicial finding of discrimination.[222]

The withholding of federal revenue sharing funds may be one of the most effective means of preventing future discriminatory practices. In *City of Chicago*, the court affirmed the district court's decision to enjoin[223] the federal government from paying the city revenue sharing funds under the State and Local Fiscal Assistance Act of 1972.[224] Section 1242(a) of the Fiscal Assistance Act states:

> No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity [funded in whole or in part with funds made available under this Act].[225]

The standards to be used in determining if the Fiscal Assistance Act provision on discrimination has been violated in the employment arena are the E.E.O.C. standards used under Title VII.[226] The withholding of revenue sharing funds, however, only deters discriminatory practices, and the absence of discriminatory practices is not an assurance that the number of blacks will increase on urban police forces. The symptoms of a problem often persist after the problem has disappeared.[227]

The dilemma that courts face in providing an appropriate remedy after employment discrimination is found is immense, and

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[220]*Id.*

[221]*See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1973).

[222]*See* note 209 *supra*.

[223]549 F.2d at 439.

[224]31 U.S.C. §§ 1221-1265 (1976).

[225]*Id.* § 1242(a).

[226]549 F.2d at 440; 31 C.F.R. § 51.53(b) (1978).

[227]In the case of seniority systems that were originally instituted with a racialist intent, but subsequently administered without a racialist intent, the detrimental effect on black employees still persists.

thus there are often contradictory approaches in a single decision. In *Kirkland v. New York State Department of Correctional Services*,[228] the district court's decision that a promotional examination had a racially discriminatory impact and thus violated Title VII was affirmed on appeal.[229] With respect to an appropriate remedy, the *Kirkland* court stated:

> A hiring quota deals with the public at large, none of whose numbers can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that regardless of their qualifications and standing in a competitive examination some of them may be bypassed for advancement solely because they are white.[230]

The court put itself in a contradictory position. By affirming the district court's decision that the examination was biased, the court indirectly declared the invalidity of the examination. Yet the court allowed whites whose positions on the eligibility list were established by a biased examination to maintain their positions.[231] If an examination had been declared invalid, it would seem to follow that whites who passed that examination could not use it as a basis for greater promotional opportunities, because the examination decreased the number of blacks in the competitive process. In essence, the decision in *Kirkland* implies that because white officers have passed a biased examination and thereby received greater promotional opportunities it would be unjust to negate such unfair advantage, irrespective of the effect on promotional opportunities for black officers.

Seniority requirements, which may be racially passive or active, often limit the number of blacks in the decision-making positions within urban police departments. In *Afro American Patrolmens League v. Duck*,[232] the Sixth Circuit Court of Appeals affirmed a district court's decision that two elements of the Toledo Police Department's promotion system perpetuated a racial imbalance on the police force.[233] These two elements were a requirement of five years of service as a patrolman in order to take the sergeant's examination and extra credit for length of service.[234] Both of these elements "tended to freeze the status quo of an almost exclusively white command corps which was established by prior discriminatory

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[228]520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

[229]*Id.* at 425.

[230]*Id.* at 429.

[231]*Id.* at 430.

[232]503 F.2d 294 (6th Cir. 1974).

[233]*Id.* at 300.

[234]*Id.*

practices."[235] A seniority system that is facially neutral, but in operation perpetuates past discrimination, has been held illegal under Title VII.[236] The court in *Duck*, though, reversed the district court's decision that in-service requirements for all promotions be reduced to one year.[237] The circuit court reasoned that:

> While seniority and experience should not be the sole . . . basis [for promotion], . . . the district court failed to strike a proper balance between the right of the people of Toledo to the protection of a police department where only seasoned and qualified officers are advanced to command positions and the necessity to obliterate as quickly as possible the present racial imbalance which exists in that Department.[238]

The balance the circuit court makes draws no distinction between *actual* harm to black patrolmen hoping to advance[239] and *possible* harm engendered by unseasoned officers in command positions. Harm that is actually injuring people should take precedence over no graver harm that is only theoretically possible. After a discriminatory seniority practice that violated Title VII was found, the remedy should have been to eliminate that discriminatory practice, not simply to curtail its effect so that the level of discrimination was reduced.

The concepts of shortening time-in-service requirements for examination eligibility and eliminating seniority points were not altogether new. In *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission*,[240] the Second Circuit suggested that the solution to the problem of too few black officers in command positions was to eliminate or reduce time-in-service requirements and seniority points.[241] *Bridgeport* exemplifies the different perspectives courts take with respect to entry level discrimination and promotional discriminations. The Second Circuit in *Bridgeport* affirmed the lower court's decision imposing entry level quotas but reversed the lower court's decision ordering quotas above the rank of patrolman.[242] The rationale for affirming the hiring quotas was that "the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a

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[235] *Id.*

[236] *Id.* at 301.

[237] *Id.* at 302.

[238] *Id.*

[239] *Id.* At the time of trial, only one black officer held a command position in the Toledo Police Department. *Id.* at 299.

[240] 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

[241] *Id.* at 1341.

[242] *Id.* at 1340-41.

time when racial divisiveness is plaguing law enforcement."[243] After making such a statement, the court dropped the logical extension of its statement, that being the need for blacks in decision-making positions. Thus, the court left the avenue open for the concentration of blacks in the lower echelon of the police hierarchy. Although the *Bridgeport* court stated that there was no finding that the promotion examination was not job-related, this was not required by *Griggs*. Once adverse racial impact is shown, the employer has the burden of proving job-relatedness. If no evidence is submitted by the employer on this issue, the plaintiffs should prevail.[244]

The *Bridgeport* court denied relief in the promotion arena under the rationale that whites whose careers were in law enforcement would be prevented from advancing solely because of color, and a quota system would increase rather than diminish racial conflict.[245] The court operated from the perspective that whites who embarked upon a police career were not aided in promotion by the fact that they did not have to compete against black personnel for promotion. It is odd that the court was concerned with whether a quota would increase rather than diminish racial animosity among whites, without considering whether an order limiting promotional opportunities for blacks would increase the conviction among blacks that such an order operates to subjugate black police officers and maintain the status quo.

VI. Methods of Increasing Black Representation

Title VII has been a judicial means to eliminate or curtail discriminatory employment practices. However, such results do not guarantee black representation on urban police departments. The value of Title VII must be measured in numerical increases and not by elimination or curtailment of discriminatory practices.

The alternatives that follow center on using Title VII as a judicial and non-judicial means to increase black representation within urban police departments. Given this focus, the judicial system is perhaps the body least able to directly increase or maintain adequate black representation within urban police departments on a long-term basis. However, because the judiciary has determined the standards to be used under Title VII, an alteration of those standards would increase black representation. The key to employing Title VII to increase black representation lies in there being no prohibition in Title VII against employers using voluntary race-conscious

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[243]*Id.* at 1341.

[244]Griggs v. Duke Power Co., 401 U.S. 424, 428-32 (1971).

[245]482 F.2d at 1341.

programs to correct a racial imbalance.[246] Thus, the power to increase black representation within urban police departments lies within individual police departments, and not the judiciary.

A. Job-Relatedness

Although Title VII contains an anti-preferential treatment provision,[247] a provision for professionally developed ability tests,[248] and a provision protecting *bona fide* seniority systems,[249] a standard of color blindness[250] for the achievement of employment objectives under Title VII is unrealistic. Employment tests that are predictive of job performance and valid under a color blindness standard may still eliminate a disproportionate number of blacks from the applicant

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[246]United Steelworkers of America v. Weber (Kaiser Aluminum), 443 U.S. 193, 207 (1979).

[247]42 U.S.C. § 2000e-2(j) (1976) provides in part:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

[248]42 U.S.C. § 2000e-2(h) (1976), provides in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such diffeerences [*sic*] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

[249]*Id.*

[250]Color Blindness is the absolute disregard of race in making employment decisions.

pool. Therefore, such a test, in conjunction with the effects of past discriminatory practices, would operate to maintain the status quo. Arguably, a standard of color blindness is an appropriate public policy objective; however, the means required to achieve such an objective mandates that race be used as a positive factor to include persons who have been excluded in the past from employment opportunities.

Even though a test that is job-related and has an adverse racial impact may still be restructured under the *Castro*[251] analysis, the restructured test would, nevertheless, be evaluated in a Title VII action under the job-relatedness standard. It is the standard of allowing occupational *requirements* to be validated solely by job-relatedness that must be examined.

The success of Title VII must be measured by reference to statistics indicating the relative rate of black unemployment and the level of black income.[252] The legislative history of Title VII fortifies this conclusion, and Title VII would be the legal method to promote greater racial economic parity.[253] In essence, for an employment qualification[254] to be valid, the qualification should be not only job-related but without an adverse racial impact.

It might be imagined that requiring an employer's qualifications to be job-related and to have no adverse racial impact would be an intolerable burden. However, given the intolerable character of overt and covert racialism such a burden would serve important public policy functions. First, it would continue to require employees to be "qualified" because hiring and promotion criteria would still have to be job-related. Second, it would be sensitive to the character of institutional racialism and the way in which such racialism takes the appearance of equal treatment. Third, a requirement of non-adverse racial impact would increase black representation in many fields, and thus effecting the underlying legislative intent of Title VII.[255] Finally, a requirement of non-racial impact for an employment qualification would not contradict any provision of Title VII, and it

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[251]459 F.2d at 733.

[252]*See, e.g.*, M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 140-42 (1966).

[253]*See* H.R. REP., No. 570 88th Cong., 1st Sess. 2-3 (1963); *Hearing on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. *passim* (1963).

[254]This includes examinations, height and weight requirements, background checks, educational requirements, and any other requirement for an occupation.

[255]Since the legislative intent underlying Title VII was the elimination of racial employment barriers, Congress must have thought that such elimination would increase the number of blacks in many occupations.

accomodates the need for qualified officers and the need for increased black representation in the police field.

B. Seniority

The use of seniority systems[256] presents a complicated problem, because a *bona fide* seniority system is protected under Title VII.[257] For years federal courts had held that seniority systems adopted without discriminatory intent did not qualify for the *bona fide* seniority systems exemption of section 703(h) of Title VII, if the effect of such systems was to perpetuate racial differences in employment status.[258] However, in *International Brotherhood of Teamsters v. United States*,[259] where a company's seniority system locked black employees into menial jobs,[260] the Supreme Court concluded that the seniority system clearly favored white employees and preserved the status quo of prior discriminatory employment practices.[261] The Court stated that "both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them."[262] Thus, *Teamsters* has effectively eliminated Title VII as a mechanism to invalidate seniority systems that are discriminatory because of past discriminatory practices, if the system is facially neutral and has been created and maintained without discriminatory intent. Obviously, *Teamsters* placed a great obstacle in the way of increasing the number of blacks in decision-making positions with urban police departments.

The Supreme Court in *Teamsters* could have interpreted the term *bona fide* in Title VII to include non-perpetuation of past discrimination, but it did not. Thus, if the goal is to eliminate seniority systems that perpetuate the effects of past discrimination, the Title VII solution seems inadequate. Because sections 1981[263] and 1983[264] have no seniority exemption, employment discrimination suits against police departments may be brought under sections 1981, 1983, and Title VII if a seniority system is called into question. An

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[256]Seniority does not necessarily reflect an individual's ability and is merely based on time served.

[257]42 U.S.C. § 2000e-2(h) (1976).

[258]*See, e.g.*, Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 983 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968).

[259]431 U.S. 324 (1977).

[260]*Id.* at 343-44.

[261]*Id.* at 349-50.

[262]*Id.* at 350.

[263]42 U.S.C. § 1981 (1976).

[264]*Id.* § 1983.

employment practice that passes the scrutiny of Title VII is not immune from attack under section 1981.[265] In *Alexander v. Gardner-Denver Co.*,[266] the Supreme Court stated that Title VII was meant to supplement existing laws relating to employment discrimination, because Congress manifested a clear intent to allow an individual to pursue rights under Title VII and other federal statutes.[267] In addition, the doctrine of election of remedies is inapplicable, because statutory rights under Title VII are distinctly separate from an employee's contractual rights.[268] Thus, there is no legal barrier to bringing an action under sections 1981, 1983, and Title VII.

Two solutions that others have set forth for solving the seniority problem are requiring the displacement of white incumbents by blacks, who without discrimination in the past would have had the incumbents' places, or allowing a black to compete for a promotion on the basis of total company service rather than seniority in an old job.[269] The second approach[270] is the one that had been used under Title VII actions prior to the *Teamsters* decision. It seems likely that the second approach would also be taken by courts, if a seniority system were challenged successfully under sections 1981 and 1983. However, the first approach, which requires displacement of whites, goes directly to the heart of the seniority problem, because it could theoretically apply not only to blacks who applied and were refused employment or promotion because of discriminatory practices, but also to blacks who did not apply for employment or promotion because of the employer's discriminatory practices. In addition, the second approach, which appeases "reverse discrimination"[271] concerns, does not consider that total company service and seniority time in an old job may be equal, and thus the aggrieved party is left without a remedy.

In the final analysis, perhaps the most effective means to remove seniority as a barrier in efforts to increase the number of blacks in decision-making positions in police departments is to totally remove seniority from the promotional process. Seniority could be

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[265]Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d at 1309-13. (Several courts have held that bona fide seniority systems are immune from attack under § 1981. *See, e.g.*, Pettway v. Am. Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979)).

[266]415 U.S. 36 (1974).

[267]*Id.* at 47-49.

[268]*Id.* at 49-51.

[269]Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

[270]*See* 416 F.2d at 988; 279 F. Supp. at 510.

[271]The term "reverse discrimination" is inapposite; "discrimination" is more appropriate.

used as a variable for police officers making horizontal employment changes, which encompass no improvement in rank, salary, or decision-making power, but should not be used for police officers making vertical employment changes, which encompass an improvement in rank, salary, or decision-making authority. The removal of certain criteria from a process is not altogether new. The Voting Rights Act of 1965,[272] for example, removed educational and testing requirements from the right of an individual to vote.[273]

C. *Race-Awareness Hiring*

The most effective way to immediately increase the number of blacks on urban police departments is race-conscious hiring. Classifications based on race, however, are suspect under the equal protection clause and are subject to strict judicial scrutiny.[274] To satisfy the strict scrutiny standard of review a classification must fulfill a *compelling government interest* and be *necessary* to promote that interest.[275] If a classification by race solely to promote employment opportunities in the police field for blacks who have been denied such opportunities meets the above criteria, it may be used. A classification by race could be justified to remedy past discrimination,[276] distribute government benefits and burdens,[277] or provide adequate health care to an underserved community.[278] Because occupations within police departments could be considered benefits provided by a government entity, using race for the purpose suggested may be constitutional. Although the use of race as an employment qualification to meet a police department's operational needs has been examined,[279] the use of race purely to increase black representation prior to a judicial finding of racial discrimination is a new area.

The perspective of this Note is that a police department should be able to use race in its employment determinations by merely deciding that the number of blacks in the police department is incongruent with the percentage of blacks of appropriate age in the

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[272]42 U.S.C. §§ 1971-1974e (1976).

[273]*Id.* § 1971(a).

[274]*See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978); Loving v. Virginia, 388 U.S. 1, 11 (1967); Fullilove v. Kreps, 584 F.2d 600, 602-03 (2d Cir. 1978), *aff'd*, 448 U.S. 448 (1980).

[275]Dunn v. Blumstein, 405 U.S. 330, 342 (1973) (emphasis added); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

[276]*See* 438 U.S. at 320.

[277]*Id.*

[278]*Id.* at 310-11.

[279]*Race as an Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U. L. Rev. 413 (1979).

employment selection area and that racialism has been a factor in contributing to the underrepresentation of blacks within the police force. In *United Steelworkers of America v. Weber (Kaiser Aluminum)*,[280] the Supreme Court held that Title VII's prohibition in section 703(a)[281] and (d)[282] against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.[283] Given the legislative history of Title VII and the reasons for Title VII,[284] an affirmative action program voluntarily adopted by private parties, before a judicial determination of racial discrimination, to eliminate traditional patterns of racial discrimination is not in violation of Title VII. The *Weber* court stated that the affirmative action plan in dispute did not curtail white advancement since *half* of those trained in the program would be white, the program was temporary, and the program was not intended to maintain a racial balance.[285] It appears that a long range race-conscious employment plan instituted to maintain a racial balance or correct a racial imbalance would not be viewed favorably by the Supreme Court. However, this is just the type of program that is needed to insure black representation. To not allow a program to be instituted soley to maintain a racial balance or correct a racial imbalance, when a racial imbalance establishes a *prima facie* case of discrimination, puts the employer in a precarious position. More importantly, avoidance of long-term race awareness solutions to long-term racial problems ensures the inadequacy of the attempted legal resolution.

Title VII does not prohibit race-conscious action to correct a racial imbalance.[286] Title VII prohibits requiring employers to perform race-awareness hiring to correct a racial imbalance,[287] but gives the authority to district courts to order any affirmative action which

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[280]443 U.S. 193 (1979).

[281]42 U.S.C. § 2000e-2(a) (1976) (section 703(a) of the Civil Rights Act of 1964). This section provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[282]42 U.S.C. § 2000e-2(d) (1976) (section 703(d) of the Civil Rights Act of 1964).

[283]443 U.S. at 201-09.

[284]*Id.* at 201-02.

[285]*Id.* at 208.

[286]*Id.* at 206.

[287]42 U.S.C. § 2000e-2(j) (1976).

may be appropriate to remedy past discrimination.[288] It has been suggested that Title VII be amended to address the issue of race-conscious hiring by non-judicial bodies.[289] The amendment would read:

> 42 U.S.C. § 2000e-2(k) Municipal Law Enforcement
>
> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for a municipality to use race as an employment qualification to integrate its law enforcement agency so as to reflect the racial composition of the municipal population when such integration is necessary to ensure the agency's effective operation.[290]

This amendment, though, would be inadequate, because it is based on the concept of using race for integration purposes and is dependent on operational necessity. An amendment more attuned to the grievances of black police officers would read:

> 42 U.S.C. § 2000e-2(k) Municipal Law Enforcement
>
> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for a municipality to use race as an integral part of its employment or promotion process to correct a racial imbalance or maintain a racial balance so as to reflect the racial composition of the municipality, if that municipality determines that the racial imbalance or threat of imbalance exists due to past or present discriminatory practices of the municipality.

Such an amendment would allow Title VII to be used as a tool to increase black representation within urban police departments without actions being brought in the judicial milieu.

In summary, to ensure employment and promotional opportunities for blacks within police departments, race-conscious hiring for the sole purpose of correcting a racial imbalance or maintaining a racial balance is necessary. Although the use of race in this manner could be used as a mechanism to limit the number of blacks in police departments, a safeguard against that problem may be a requirement that a municipality's affirmative action program instituted under the above proposed section be annually reviewed by a local multi-racial committee. In addition, if a municipality makes an

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[288] *Id.* § 2000e-5(g).

[289] *See* 54 N.Y.U. L. REV., *supra* note 279, at 442.

[290] *Id.*

in-house determination of past or present discrimination and implements adequate programs to correct the problem, the municipality could be granted a limited amount of immunity from discrimination actions that would seek to hold the municipality liable for its in-house determination of discrimination.

VII. Conclusion

The problems confronting urban police departments with respect to the issue of black representation are numerous, difficult, and subtle. Given the constraints of Title VII and the judicial interpretations of Title VII, the ability of police departments to directly increase or maintain black representation on a long-term basis is still minimal. Indeed, Title VII has been a legal instrument to eradicate obstacles that might deny black mobility, but such eradication does not necessarily increase the number of blacks within a field. In evaluating the success of Title VII, the percentage increase in black representation should be the sole criterion, because it is the best indicator of legislatively mandated black progress. This Note has suggested three ways to increase black representation within urban police departments: (1) requiring occupational qualifications to be job-related and have no adverse racial impact; (2) not allowing seniority per se to be considered in the promotion process; and (3) an amendment to Title VII allowing race-conscious hiring to maintain a racial balance or correct a racial imbalance. If these suggestions were implemented, Title VII would be an effective means to increase black representation within urban police departments.

Alan K. Mills

Does The First Amendment Incorporate A National Civil Service System?

I. Introduction

The practice of political patronage in which government employment is based upon political affiliation rather than individual merit is as old as the republic.[1] Before 1976, political patronage employees could be dismissed solely on the basis of political affiliation. Yet, in 1976, the United States Supreme Court, in *Elrod v. Burns*,[2] invalidated patronage dismissals of nonpolicymaking, nonconfidential public employees.[3] In the wake of scholarly criticism and difficulty in applying the *Elrod* standard, the Court in 1980 again addressed the validity of patronage practices in the case of *Branti v. Finkel*.[4] In expanding the class of protected public employees the Court in *Branti* redefined the standard of dischargeability and included patronage hirings as an impermissible activity.[5]

This Note details the standard of dischargeability and the breadth of the *Branti* holding, and analyzes the revisions of the *Elrod* standard brought about by *Branti*. The thesis of this Note is that while *Branti* has expanded the first amendment guarantee of freedom of association afforded public employees to protect against patronage-motivated employment practices, the revised standard of dischargeability remains difficult to apply and will result in confusion and inconsistent lower court decisions in determining the extent of the protected class of public employees.[6]

II. A Brief Description of the Political Patronage System

For nearly two hundred years following every partisan election, the "spoils system"[7] has meant that at all levels of government, public employees appointed to non-civil service positions[8] were sub-

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[1]Schoen, *Politics, Patronage, and the Constitution*, 3 Ind. Legal F. 35, 36 (1969).

[2]427 U.S. 347 (1976).

[3]*Id.*

[4]445 U.S. 507 (1980). *See generally* N.Y.L.J., Apr. 1, 1980, at 1, col. 2.

[5]445 U.S. at 507.

[6]For an authoritative warning to this effect, *see* 445 U.S. at 521 (Powell, J., dissenting).

[7]The term "spoils system" evolved during the presidency of Andrew Jackson and is derived from the phrase "to the victor go the spoils." Note, *Patronage and the First Amendment After* Elrod v. Burns, 78 Colum. L. Rev. 468, 468 n.2 (1978).

[8]Non-civil service positions are characterized by the employing authority exercising unfettered discretion in the hiring, promotion, discipline, and termination of its employees. A proliferation of civil service or merit systems which involve competitive

ject to dismissal in the event of an election victory by the opposing political party. This system of political patronage was first utilized by United States Presidents to maintain intra-party discipline and has been most commonly attributed to President Andrew Jackson in his effort to consolidate factions of the Democratic party at the expense of the Federalist-National Republican party.[9] Patronage practices range from favorable treatment in awarding government contracts, to party assessments,[10] to appointments and promotions in public employment. Patronage may for the purposes of this Note be defined as "the process of distributing government jobs wherein the political affiliation of an applicant or employee is *the* consideration or *a* consideration in the decision to hire or fire."[11] Thus, decisions pertaining to employment as well as other favors are based in whole or in part on political affiliation as opposed to individual merit.

The constitutional danger of patronage practices is infringement of the first amendment rights of freedom of belief and association. These encroachments may take the form of overt attempts to change a person's political allegiance[12] or of even more subtle efforts to withhold public benefits from those who are politically disfavored.[13]

III. The Origins of Freedom of Association

While the case law history of the freedoms delineated in the first amendment largely post-dates World War I, the growth of the individual rights of association and expression in the past sixty years has been dramatic.[14] The modern interpretation of the right to association or assembly was first enunciated by the Supreme Court in 1958 in a civil rights setting in the case of *NAACP v. Alabama*.[15] The Court denied an attempt to procure the membership list of the organization, basing its decision on the right of association.[16] The

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examination and ranking of individuals according to merit, has created a decline in the use of non-civil service employment in recent years. *See also* 427 U.S. at 354.

[9]Farkas v. Thornburgh, 493 F. Supp. 1168, 1169 n.3, 1170 n.6 (E.D. Pa. 1980), *aff'd without opinion*, 642 F.2d 441 (3d Cir. 1981).

[10]This may take the form of an involuntary contribution of a percent of the employee's salary, such as a "two-percent club," with that amount going directly to the party coffers.

[11]Schoen, *Politics, Patronage, and the Constitution*, 3 Ind. Legal F. 35, 38 (1969).

[12]*See* notes 67-68 *infra* and accompanying text (public employees discharged for failure to affiliate with the Democratic party).

[13]Delong v. United States, 621 F.2d 618 (1980) (public employee transferred from Maine to Washington, D.C. because of earlier Republican party sponsorship).

[14]G. Gunther, Cases and Materials on Constitutional Law 1105 (10th ed. 1980).

[15]*Id.* at 1457.

[16]357 U.S. 449 (1958).

standard of strict judicial scrutiny along with the requirement of a compelling state interest to justify any infringement upon constitutionally-protected rights was applied by the Court[17] in recognizing a constitutional right of association based on the first amendment and the "liberty" aspects of the due process clause of the fourteenth amendment.[18] The Court described the importance of associational rights in these terms: "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[19] The Court continued:

> It is beyond debate that freedom to engage in association . . . is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[20]

Recently the Supreme Court complemented this analysis by recognizing a counterpart freedom of a right not to associate. In *Abood v. Detroit Board of Education*[21] it was held that while public employees could be required to pay union dues or an equivalent fee for functions such as collective bargaining and grievance administration, individual members could not be required to contribute to the campaigns of political candidates and they could bar the union from expending mandatory fees in a similar manner or from publicly maintaining political positions unrelated to the role of the union as a bargaining agent.[22]

The current limits of freedom of association are illustrated in three recent cases. *Kusper v. Pontikes*[23] involved an Illinois statute which prohibited a person from voting in a primary election if that person had, within the preceeding twenty-three months, voted in the primary of another political party.[24] The Court held that despite the

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[17]*Id.* at 460-61, 463; G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1455 (10th ed. 1980).

[18]357 U.S. at 460.

[19]*Id.* (citing Thomas v. Collins, 323 U.S. 516, 530 (1945); Delong v. Oregon, 299 U.S. 353, 364 (1937)).

[20]357 U.S. at 460-61.

[21]431 U.S. 209 (1977).

[22]*Id.*

[23]414 U.S. 51 (1973).

[24]*Id.*

legitimate state interest in preventing "raiding,"[25] a state may not choose means which unnecessarily restrict the constitutionally protected freedom of association.[26]

A second case, *Broadrick v. Oklahoma*,[27] concerned a challenge by public employees to a state statute which restricted political activity of public officials during working hours.[28] In upholding the regulation, the Court ruled that the statute regulated political activity in an even-handed and neutral manner and that the statute was not directed at any particular group or viewpoint.[29]

The Federal Election Campaign Act was challenged in *Buckley v. Valeo*,[30] in which the Court upheld the statute's limitation on individual contributions to political campaigns. The Court overturned the limitation on the allowable maximum contribution a candidate may make to his own campaign, invalidated provisions limiting total campaign expenditures, and struck down restrictions on expenditures made independently of the candidate's official campaign.[31] In *Kusper* and in *Buckley*, the standard of strict scrutiny was applied.[32]

Several early cases that treated the relationship between patronage practices and freedom of association recognized a limited rule which prohibited the consideration of specified individual characteristics in making public appointments.[33] In *United Public Workers v. Mitchell*[34] the Court agreed that a congressional act which barred from federal employment any "Republican, Negro, or Jew" would be unconstitutional.[35] Similarly, the Court in *Wieman v. Updegraff*[36] concluded that equivalent constitutional protection for Republicans, Negroes, and Jews applied to a state public employment statute.[37] A case dealing with admission for professional prac-

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[25]"Raiding" is the practice of voters sympathetic to one party casting their ballots in the primary election of another party to distort the outcome. *Id.* at 59.

[26]*Id.* at 61.

[27]413 U.S. 601 (1973).

[28]*Id.*

[29]*Id.* at 615-16.

[30]424 U.S. 1 (1976).

[31]*Id.*

[32]*Id.* at 24-27, 52-53, 64-65; 414 U.S. at 58-61.

[33]*See* Schoen, *Politics, Patronage, and the Constitution*, 3 IND. LEGAL F. 35, 61-62 (1969).

[34]330 U.S. 75 (1947).

[35]*Id.* at 100 (Hatch Political Activity Act consistent with the prohibited classifications enumerated).

[36]344 U.S. 183 (1952).

[37]*Id.* at 191-92. In overturning an Oklahoma statute prescribing loyalty oaths for state employees, the Court stated: "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

tice, *Schware v. Board of Bar Examiners*,[38] also prohibited exclusionary practices faced by Republicans, Negroes, or "a member of a particular church."[39] While the above cases prohibited consideration of the political membership, race, or religion of an individual, the cases have been narrowly read and have never been construed to apply to patronage practices.[40]

IV. The Traditional Bases for Denying Challenges to the Patronage System

Historically, the courts have denied the constitutional claims of public employees dismissed or injured by patronage practices.[41] The prevailing early judicial attitude is best summarized by one court in the following manner: "Those [public employees] who . . . live by the political sword must be prepared to die by the political sword."[42] As a general rule, public employees enjoyed little job security and were expected to anticipate dismissal in the event of changes on the political front.[43]

The courts have relied upon two theories in denying constitutional attacks upon patronage dismissals. The first theory, entitled the "right-privilege distinction", held that public employment, rather than being a right, was a mere privilege which could be withdrawn by the employing authority at will.[44] The second or "waiver theory" stated that acceptance of public employment when patronage was the selection basis or when the prospective employee knew of relevant past patronage practices created a waiver of applicable constitutional rights.[45] While the "right-privilege distinction" simply declared that no constitutional rights existed, the "waiver theory" recognized that even if such rights existed, they were waived automatically upon the acceptance of an appointment.[46]

In *Adler v. Board of Education of New York*,[47] the "right-privilege distinction" was utilized by the Supreme Court to sustain

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[38]353 U.S. 232 (1957).

[39]*Id.* at 239.

[40]*See* note 33 *supra* and accompanying text.

[41]AFSCME v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

[42]*Id.* at 537, 280 A.2d at 378.

[43]Comment, *Political Patronage and the Fourth Circuit's Test of Dischargeability After* Elrod v. Burns, 15 Wake Forest L. Rev. 655, 660 (1979).

[44]*See* Note, *Constitutional Law*—Elrod v. Burns: *Patronage in Public Employment*, 13 Wake Forest L. Rev. 175, 177-78 (1977).

[45]*Id.* at 179.

[46]*See, e.g.*, AFSCME v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971), where the "right-privilege distinction" and the "waiver theory" were both used to defeat the claim of a dismissed public employee.

[47]342 U.S. 485 (1952).

dismissal of several public school teachers. The case involved a state statute which disqualified from public employment any person advocating or teaching the overthrow of the government by force or violence.[48] The teachers, members of the Communist Party, claimed a violation of their freedom of association and speech.[49] The Court held that public employment was a privilege in which constitutional protection was not available and stated that the appellants "may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[50] *Adler* represented an insurmountable obstacle to any successful constitutional claim arising from a patronage-motivated dismissal of a public employee.

Although not entirely discredited, the "right-privilege distinction" was notably restricted by *Board of Regents of State Colleges v. Roth*[51] in a nonpatronage setting. In *Roth*, a nontenured university professor was notified without explanation that he would not be rehired for the following year. While the Court in holding for the university did not find that a nontenured position constituted a property right as required for due process protection, it did reject "the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."[52]

The "waiver theory" was utilized by the Fourth Circuit Court of Appeals in *Nunnery v. Barber*[53] to deny the claim of a dismissed state employee who knowingly accepted the patronage position of manager rather than a civil service position as a cashier.[54] The court in its holding emphasized the voluntary nature of that choice, stating that "her awareness that her position was a patronage job and that she accepted it voluntarily with full understanding that, granted on the basis of patronage, it was terminable on that same basis, gives her no right to complain of her patronage dismissal."[55] The court concluded that even if no civil service position had been available, the knowing acceptance of such a patronage position constituted a waiver.[56]

In *Elrod v. Burns*[57] the Court was thus confronted by these two

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[48]*Id.* at 489.

[49]*Id.* at 491-92.

[50]*Id.* at 492.

[51]408 U.S. 564 (1972).

[52]*Id.* at 571. *Accord*, Graham v. Richardson, 403 U.S. 365, 374 (1971) (denial of welfare benefits to aliens may not be based on "right-privilege distinction").

[53]503 F.2d 1349 (4th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975).

[54]*Id.* at 1359.

[55]*Id.* at 1359-60.

[56]*Id. See* AFSCME v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971).

[57]427 U.S. at 347.

theories detailed in the case law. The "right-privilege distinction," as suggested above, proved a minor obstacle due to its earlier erosion.[58] In its decision the Court stated that it had "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' "[59] The "waiver theory" which was nearly unquestioned to that time was largely ignored by the Court.[60]

V. *ELROD V. BURNS*: PATRONAGE DISMISSALS PROHIBITED

Patronage dismissals have traditionally been justified by the party in power as promoting efficient government through a singleness of staff purpose,[61] as an aid to unity and to effecting those policies newly sanctioned by the electorate,[62] and as a crucial element to the survival of political parties.[63] In *Storer v. Brown*[64] the Court endorsed the role of patronage practices in nurturing stable political parties as a way to avoid "splintered parties and unrestrained factionalism [which] may do significant damage to the fabric of government."[65] Indeed, as Justice Powell indicated, it may be difficult to overestimate the value of patronage to our democratic system of government.[66]

Elrod v. Burns[67] involved dismissal of Republican non-civil service employees of the Cook County, Illinois sheriff's office by the recently elected Democratic sheriff. Because the positions threatened were non-civil service, no statute protected them from arbitrary or patronage-motivated discharge. Traditionally, each newly-elected sheriff of a party different than his predecessor would dismiss those non-civil service employees who "lack or fail to obtain requisite support from, or fail to affiliate with"[68] the party currently in power.

The employees who had been dismissed or had been threatened with dismissal, based their claim on their freedom of political association and expression protected by the first and fourteenth amendments and several federal civil rights statutes.[69] Specifically, they alleged that the sole reason for dismissal was that they were

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[56]*Id.* at 361-62.
[59]427 U.S. at 361 (quoting Sugerman v. Dougall, 413 U.S. 634, 644 (1973)).
[60]427 U.S. at 359 n.13.
[61]*Id.* at 364.
[62]*Id.* at 367.
[63]*Id.* at 368-69.
[64]415 U.S. 724 (1974).
[65]*Id.* at 736.
[66]427 U.S. at 385 (Powell, J., dissenting).
[67]427 U.S. at 347.
[68]*Id.* at 351.
[69]*Id.* at 350.

neither affiliated with nor sponsored by the Democratic party.[70] The district court dismissed the suit for failure to state a claim, but the Seventh Circuit reversed,[71] and the Supreme Court affirmed for the employees.[72] The Supreme Court, though, was divided sharply into a three-justice plurality, a two-justice concurrence, and a three-justice dissent.[73]

A. The Elrod *Plurality Opinion*

The plurality opinion written by Justice Brennan[74] initially rejected both theories which had historically defeated constitutionally-based challenges to patronage dismissals.[75] After reviewing the erosion of the "right-privilege distinction", the Court invalidated the distinction by holding that a public benefit such as public employment could not be characterized as a privilege rather than a right for purposes of limiting constitutional access to that benefit.[76]

The "waiver theory" was dismissed in a footnote as placing an impermissible condition upon a public benefit.[77] Because government may not directly foster one party over another, the plurality reasoned that applying a waiver to the constitutional rights of patronage-discharged employees would achieve by indirection an analogous unconstitutional result.[78] The dissent questioned the plurality's analysis of the pleadings and evidence and strongly criticized its "rush to constitutional adjudication."[79]

Although the plurality explicitly addressed only patronage dismissals, it also discussed other forms of patronage[80] and indicated a disapproval extending beyond the employee discharge setting.[81] The Court noted that when confronted with patronage dismissals, a public employee is coerced by the implicit or actual threat of discharge to support a party counter to his true beliefs while at the same time diminishing the employee's support for his chosen party.[82]

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[70]*Id.*

[71]Burns v. Elrod, 509 F.2d 1133 (7th Cir. 1975), *aff'd*, 427 U.S. 347 (1976).

[72]427 U.S. at 374.

[73]Justice Stevens did not participate. *Id.* His views opposing patronage dismissals were made clear in an earlier opinion in which he said that such practices are at war with the more significant rights embodied in the first amendment. Illinois State Employees Council 34 v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).

[74]Justice Brennan was joined by Justices Marshall and White. 427 U.S. at 349.

[75]*Id.* at 359-61.

[76]*Id.* at 361.

[77]*Id.* at 359 n.13.

[78]*Id.*

[79]*Id.* at 380-81 (Powell, J., dissenting).

[80]*Id.* at 353 (Brennan, J., for the Court).

[81]*Id.* at 355-57, 359.

[82]*Id.* at 355-56.

The only alternative available to the employee was dismissal. The Court then declared that patronage dismissals clearly violated the first amendment freedoms of association and expression and were thus unconstitutional.[83]

Justice Brennan then considered whether the three state interests[84] set forth by the petitioners were sufficient to justify encroachment upon the first amendment.[85] In analyzing the state interests the Court relied upon the standard of strict judicial scrutiny which requires a vital governmental end furthered by means least restrictive of the first amendment rights, with the benefit to the government substantially outweighing the loss of protected rights.[86] The Court found that none of the state interests, with one exception, justified the use of patronage dismissals.

The argument that patronage dismissals encourage efficient government was not accepted by the plurality in view of the inherent inefficiencies in the patronage system itself. Those inefficiencies included indiscriminate terminations and the failure to hire more capable replacements.[87] The Court further ruled that the state interest in effecting those unified policies newly sanctioned by the electorate did not justify dismissing non-policymaking employees who could not frustrate the goals of a new administration,[88] but did justify dismissal of policymaking employees who posed such a threat.[89] Finally, the state interest in retaining patronage dismissals as necessary to the survival of political parties was not accepted, because parties had well survived earlier reductions in their patronage power.[90] Therefore, the plurality ruled that patronage dismissals as practiced by the petitioners were unconstitutional under the first and fourteenth amendments.[91]

B. The Elrod *Concurring Opinion*

The concurrence, authored by Justice Stewart,[92] agreed at least implicitly with all the reasoning set forth by the plurality with the following exceptions:

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[83]*Id.* at 359-60.

[84]*Id.* at 361, 364-68.

[85]*Id.* at 360.

[86]Buckley v. Valeo, 424 U.S. 1 (1976) (recognizing that strict judicial scrutiny applies when first amendment rights are infringed).

[87]427 U.S. at 364-65.

[88]Without explanation the Court assumed that non-policymaking employees could not frustrate an administration's goals even when acting collectively. *Id.* at 367.

[89]*Id.* at 367.

[90]*Id.* at 369. *See* notes 64-66 *supra* and accompanying text.

[91]427 U.S. at 373.

[92]Justice Stewart was joined by Justice Blackmun.

> This case does not require us to consider the broad contours of the so-called patronage system, with all its variations and permutations. In particular, it does not require us to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular political party, and I would intimate no views whatever on that question.[93]

Thus, the members of the concurrence refused to join in the expansive plurality opinion and thereby limited the holding to prohibit only patronage-motivated dismissals. The concurrence also qualified the policymaking standard to include a confidential-nonconfidential inquiry, without an explanation for so doing.[94]

C. *The* Elrod *Dissenting Opinion*

Justice Powell's dissent initially relied upon the "waiver theory" to argue that respondents had waived their first amendment rights by accepting public employment with knowledge of past patronage practices.[95] In emphasizing the importance of the plaintiff's earlier use and enjoyment of the same system now challenged, the dissent stated that: "beneficiaries of a patronage system may not be heard to challenge it when it comes their turn to be replaced."[96]

The dissent noted that the historical importance of patronage was greater than that recited by the plurality, and criticized this shortcoming.[97] It reasoned that the state interests claimed by petitioners justified the encroachment upon first amendment rights. The dissent criticized the plurality for seriously underestimating "the strength of the government interest—especially at the local level—in allowing some patronage hiring practices, and [exaggerating] the perceived burden on First Amendment rights."[98]

The dissent emphasized the role that patronage has played in preventing political fragmentation[99] by attracting campaign support

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[93]*Id.* at 374 (Stewart, J., concurring).

[94]*Id.* at 375.

[95]Justice Powell was joined by Chief Justice Burger and Justice Rehnquist. The Chief Justice additionally published a brief separate dissent in which he criticized the Court's decision as usurping the proper role of the states and their legislatures. In characterizing the Court's decision as "trivializing constitutional adjudication," he stated that the majority strained the bounds of the first amendment "to hold that the Constitution *commands* something it has not been thought to require for 185 years." *Id.* at 375-76. (Burger, C.J., dissenting).

[96]*Id.* at 380 (Powell, J., dissenting).

[97]*Id.* at 382.

[98]*Id.* (footnote omitted).

[99]*Id.* at 383.

to the parties even during times of widespread voter apathy.[100] The importance of patronage at the local level, such as in the case at hand, was especially emphasized as critical to the democratic process in that "the hope of some reward generates a major portion of the local political activity supporting parties."[101]

VI. *ELROD V. BURNS*: THE AFTERMATH

Legal scholars welcomed *Elrod* as a much needed limit on patronage dismissals and as a vindication of the first amendment rights of association and expression.[102] However, *Elrod* has been widely criticized for introducing new uncertainties into political patronage practices. Two criticisms have been widely voiced: (1) the breadth of the *Elrod* holding and its effect upon patronage practices other than dismissals are unclear;[103] and (2) difficulty has been experienced in distinguishing between nonpolicymaking, nonconfidential employees, who are protected from dismissal, and policymaking, confidential employees who are not so protected.[104]

The scope of the *Elrod* holding was limited by the divergence of the plurality and concurring opinions. Based on the least common denominator[105] of the two opinions, the *Elrod* holding first prohibited patronage dismissals limited to the facts of the case, and second, the test of dischargeability considered confidential relationships in addition to the policymaking nature of the position.[106] Questions remained, however, as to the potential applicability of the above standards to political hiring, political non-rehiring, and other patronage practices.

One case which has interpreted *Elrod* refused to extend the umbrella of protection to situations involving a patronage-motivated refusal to rehire a public employee.[107] In *Ramey v. Harber*,[108] several deputies held office only during the term of their appointing sheriff. When the newly elected Democratic sheriff took office, he refused, solely on the basis of their political affiliation, to reappoint the deputies. The court in dicta noted that "there is considerable uncer-

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[100]*Id.* at 384.

[101]*Id.* at 385.

[102]Note, Elrod v. Burns: *Chipping at the Iceberg of Political Patronage*, 34 WASH. & LEE L. REV. 225 (1977). *See* notes 104, 127, & 193 *infra*.

[103]*See* Note, *Patronage and the First Amendment After* Elrod v. Burns, 78 COLUM. L. REV. 468 (1978).

[104]*See* Note, *Political Patronage and the Fourth Circuit's Test of Dischargeability After* Elrod v. Burns, 15 WAKE FOREST L. REV. 655 (1979).

[105]Marks v. United States, 430 U.S. 188, 193 (1977).

[106]427 U.S. at 347.

[107]Ramey v. Harber, 589 F.2d 753 (4th Cir. 1978), *cert. denied*, 442 U.S. 910 (1979).

[108]*Id.*

tainty as to how a majority of the Supreme Court would treat a failure to rehire and other patronage practices."[109]

In *Johnson v. Bergland*,[110] the plaintiff asserted that his interstate reassignment constituted a demotion caused by his "incorrect" political affiliation. The district court held for the defendants and the Fourth Circuit reversed. In recognizing a valid claim for relief, the court stated that if the plaintiff was a nonpolicymaking, nonconfidential employee transferred for political reasons, "the fact that he was relocated in a distant state shortly after being placed . . . would suffice to establish an infringement of his first amendment rights."[111]

One commentator, in analyzing political non-rehiring by the tests employed in *Elrod*, concluded that the Court would find a political refusal to rehire unconstitutional because the burdens on the first amendment are comparable.[112] Using a similar analysis, the author found it less likely that political hiring and nonemployment patronage practices would be invalidated by the Court because of a lesser burden on first amendment rights and a stronger state interest to justify burdening protected rights.[113]

These cases and comments clearly indicate the uncertainty of the breadth of *Elrod* beyond its particular fact situation. Difficulty in applying the policymaking-nonpolicymaking, confidential-nonconfidential distinctions also evoked criticism. In its plurality opinion the Court set forth some guidance for making the determination even though it acknowledged that "[n]o clear line"[114] exists:

> While policymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have . . . only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.[115]

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[109]*Id.* at 757.

[110]586 F.2d 993 (4th Cir. 1978).

[111]*Id.* at 995.

[112]Note, *Patronage and the First Amendment After* Elrod v. Burns, 78 COLUM. L. REV. 468, 474-75 (1978).

[113]*Id.* at 476-78.

[114]427 U.S. at 367.

[115]*Id.* at 367-68.

The confidential-nonconfidential component of the dischargeability test as presented in the concurrence was neither illustrated nor defined.[116]

Because actual application of the *Elrod* dischargeability standard has been difficult, various courts have been forced to redefine the test with differing results.[117] A discretionary versus purely ministerial inquiry[118] has been undertaken to ascertain the role of the employee in the policymaking process.[119] Alternatively, the impact of the employee's decisions on the overall operation or broad goals of the office has been employed to ascertain the policymaking or nonpolicymaking nature of the position.[120]

The confidential-nonconfidential distinction has received little comment, but the least common denominator test[121] requires that the confidential inquiry supplement the policymaking-nonpolicymaking distinction to form a two-part standard. Thus an employee must be both nonpolicymaking and nonconfidential to be accorded constitutional protection against partisan discharge.[122] One court has described the traits of a confidential position as requiring loyalty to the officeholder or such a relationship to the officeholder that illegal conduct on the employee's part could expose the employer to civil liability.[123]

Procedural problems germane to patronage actions were detailed by the Court in *Mount Healthy City Board of Education v. Doyle*[124] in which a public school teacher was not rehired in substantial part because of protected speech.[125] A dismissed public employee bears a formidable burden of proof in demonstrating that constitutionally protected conduct was a "substantial" or "motivating" factor in the decision to dismiss an employee.[126] If this burden is discharged, the burden of going forward shifts to the employer who may demonstrate that the employee would have been discharged even if he had not engaged in protected conduct. Thus, an impermissibly dismissed

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[116]*Id.* at 374-75 (Stewart, J., concurring).

[117]Newcomb v. Brennan, 558 F.2d 825 (7th Cir. 1977), *cert. denied*, 434 U.S. 968 (1977).

[118]558 F.2d at 830.

[119]*Id.* at 829-31.

[120]*Id.* at 825.

[121]*See* note 105 *supra.*

[122]427 U.S. at 375.

[123]McCollum v. Stahl, 579 F.2d 869, 872 (4th Cir. 1978), *cert. denied*, 440 U.S. 912 (1979) (While *McCollum* allows dismissal of a secretary or a deputy sheriff under the loyalty standard, only the deputy sheriff could be dismissed under the *McCollum* imputed illegal conduct standard).

[124]429 U.S. 274 (1977).

[125]*Id.* at 282.

[126]*Id.* at 287 (construing Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977)).

employee "can prevail only if the court finds that he would have been rehired *but for* the impermissible factor."[127]

VII. *BRANTI V. FINKEL*: A CLARIFICATION?

In its first opportunity to clarify the questions raised by *Elrod*, the Supreme Court in *Branti v. Finkel*[128] was faced with the claims of two assistant county public defenders who alleged impending dismissal solely because of their political affiliation. The plaintiffs were appointed by the Rockland County Public Defender, a Republican, who in turn was appointed by the Republican-dominated County Legislature. When the Democrats gained control of the legislature, a Democrat was appointed to the public defender position and notification of termination was given to the plaintiffs.[129]

The district court ruled that the sole ground for removing the plaintiffs was that their "political beliefs differed from those of the ruling Democratic majority in the County Legislature . . . ."[130] In declaring the plaintiffs to be nonpolicymakers, the district court conceded that while strategy decisions were made concerning individual cases, no policy was formulated by the plaintiffs respecting the "broad goals of the office."[131] The plaintiffs were classified as nonconfidential by the court because they did not have access to confidential documents and because no confidential relationships existed which affected formulation of broad office policy.[132] The defendant's claim in the alternative that the plaintiffs were incompetent was dismissed by the court as unsupported by the clear weight of the evidence.[133] On appeal, the Second Circuit affirmed without opinion.[134]

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[127]Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 YALE L.J. 376, 384 (1979) (emphasis added) (This Note argues that the "but for" test imposes too great a burden of proof upon the employee and proposes use of a "substantial cause test" to prevent after the fact justifications by the employing authority).

[128]445 U.S. 507.

[129]Finkel v. Branti, 457 F. Supp. 1284 (S.D.N.Y. 1978), *aff'd*, 598 F.2d 609 (2d Cir. 1979), *aff'd*, 445 U.S. 507 (1980).

[130]457 F. Supp. at 1293.

[131]*Id.* at 1291. The court characterized decisions made in the context of specific cases, such as plea bargaining, as outside the formulation of policy affecting the "broad goals of the office." *Id.*

[132]*Id.* at 1292. The court did not decide whether an employee who executes broad office policy would be considered confidential. *Id.*

[133]*Id.*

[134]Finkel v. Branti, 598 F.2d 609 (2d Cir. 1979), *aff'd*, 445 U.S. 507 (1980).

A. The Branti *Majority Opinion*

The defendant raised four arguments before the Supreme Court, two of which were summarily dismissed. The claim that the plaintiffs were incompetent and would have been dismissed despite the protected activity[135] was dismissed by the Court as unsubstantiated by the evidence.[136] The Court further observed that the defendant's "waiver theory" argument was clearly rejected in *Elrod*.[137]

The defendant then contended that the holding in *Elrod* was limited to those situations in which a public employee is "coerced into pledging allegiance to a political party that [he] would not voluntarily support and does not apply to a simple requirement that an employee be sponsored by the party in power . . . ."[138] In the opinion written by Justice Stevens,[139] the Court reviewed the *Elrod* rationale for invalidating patronage dismissals. The first reason supporting *Elrod* was that the dismissals encroached upon the first amendment freedoms of belief and association because employment could only be secure if employees pledged their allegiance to work for, or obtain a sponsor from, the Democratic party.[140] The Court stated that the "inevitable tendency of such a system was to coerce employees into compromising their true beliefs."[141]

Justice Stevens noted the second reason supporting the *Elrod* holding was that the practice imposed an unconstitutional condition upon the receipt of a public benefit.[142] Reiterating the erosion of the "right-privilege distinction," the majority stated that even an employee who has no right to retain his job "cannot be dismissed for engaging in constitutionally protected speech . . ."[143] or association.

Applying the rationale of *Elrod*, the Court considered the position of the defendant anomalous in that a public employee could be "dismissed with impunity"[144] as long as there was no coercion to support the party in power.[145] The Court ruled that:

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[135]*See, e.g.*, notes 124-27 *supra* and accompanying text.

[136]445 U.S. at 512 n.6.

[137]*Id. See* notes 77 & 78 *supra* and accompanying text.

[138]445 U.S. at 512.

[139]Justice Stevens was joined by Chief Justice Burger and Justices Brennan, Marshall, White, and Blackmun.

[140]The district court observed that the plaintiff Finkel changed his party affiliation in 1977 from Republican to Democrat to further his chances of reappointment under the patronage system. 457 F. Supp. at 1285 n.2.

[141]445 U.S. at 513 (construing Elrod v. Burns, 427 U.S. 347, 355-56 (1976)).

[142]445 U.S. at 514.

[143]*Id.* (construing Perry v. Sinderman, 408 U.S. 593 (1972)).

[144]445 U.S. at 516.

[145]*Id.*

> While it would perhaps eliminate the more blatant forms of coercion described in *Elrod*, it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job. More importantly, [defendant's] interpretation would require the Court to repudiate entirely the conclusion . . . that the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs.[146]

In sum, the Court stated that it would be sufficient to prove that the discharge was motivated solely by lack of affiliation with the dominant party, making it unnecessary to demonstrate coercion.[147]

As to the defendant's final argument that the discharged employees held policymaking or confidential positions, Justice Stevens wrote that the policymaking and confidentiality distinctions noted in *Elrod* did not encompass those areas of proscribed dismissal with sufficient accuracy.[148] He declared that the policymaking distinction was over-inclusive, illustrating his position with an example of the policymaking and confidential, albeit nonpolitical, position of the coach of a state university football team.[149] Similarly, Justice Stevens indicated the under-inclusive nature of the policymaking and confidentiality distinctions with an example of election judges who are statutorily required to be members of different parties, thereby illustrating a political but nonpolicymaking, nonconfidential position.[150]

Based on this weakness of the *Elrod* standard, Justice Stevens revised the policymaking, confidentiality inquiry, stating: "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[151]

Applying this revised standard, the Court ruled that an assistant public defender is primarily responsible to his individual clients. Any policymaking or confidential information obtained would

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[146]*Id.* at 516-17 (footnote omitted).

[147]*Id.* at 517.

[148]*Id.* at 517-18.

[149]*Id.* at 518. The Court observed that the relevance of party affiliation to patronage dismissal was not based upon a policymaking or confidentiality inquiry but upon the responsibilities of the position in question. *Id.*

[150]*Id.* at 518. The Court emphasized that its conclusion was not based upon the absence of policymaking or confidential duties, but upon the necessity for specific party membership to discharge the responsibilities of the position. *Id.*

[151]*Id.* at 518.

have no relationship to partisan political concerns.[152] In this light, the Court ruled that to best nurture effectiveness of the office, an assistant public defender could not permissibly be dismissed for partisan political reasons.[153]

B. The Branti *Dissenting Opinion*

Writing for the dissent,[154] Justice Powell[155] criticized the vagueness of the new standard. Noting the standard's sweeping language, the opinion emphasized that public officials, among others, will be without guidance in determining whether a position may properly be considered political.[156] Justice Powell strongly questioned the majority's use of inappliable precedents in applying the first amendment to the issue of patronage dismissals.[157] Additionally, the dissent argued that the voters of Rockland County had ratified the patronage system by its continuation through their elected legislators and that the majority opinion effectively abolished the right to the electorate to choose its own structure of government.[158]

Finally, Justice Powell maintained that important government interests in patronage dismissals justify burdening first amendment rights. He characterized the role of patronage as central to stable political parties, efficient functioning of the election process, and the operation of government during an officeholder's term. Justice Powell predicted that in the final analysis, "the effect of the Court's decision will be to decrease the accountability and denigrate the role of our national political parties."[159]

VIII. The Expansion of Patronage Practice Prohibitions

One of the most significant changes ushered in by *Branti* was in shifting the focus of the dischargeability standard from the duties of

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[152]Conversely, the Court intimated that a prosecutor could be dismissed for partisan reasons because of the broader public responsibilities of the office and implied that this logic applied to a public defender as well. *Id.* at 519 n.13.

[153]*Id.*

[154]Justice Stewart published a brief separate dissent in which he characterized the plaintiffs as confidential employees similar to the professional association found in a firm of lawyers and thus not qualified for constitutional protection. *Id.* at 520-21. *But see id.* at 520 n.14.

[155]Justice Powell was joined by Justice Rehnquist and in part by Justice Stewart. *Id.* at 521.

[156]*Id.* at 523-26 (Powell, J., dissenting).

[157]*Id.* at 526-27. The dissent reasoned that had the majority applied applicable precedents, any burdening of first amendment rights could have been justified with an intermediate level of judicial scrutiny and no constitutional violation would have been found. *Id.*

[158]*Id.* at 532-34.

[159]*Id.* at 531.

a particular public employee to the effective performance of a public office. The *Elrod* standard emphasized the actual position held by the discharge-targeted employee, including the scope of his responsibilities, the concreteness of his objectives, and his influence upon the formulation and implementation of broad goals.[160] Conversely, the *Branti* test of dischargeability scrutinizes, in the abstract, the position concerned as being policymaking or confidential and poses the question of whether "party affiliation is an appropriate requirement for the effective performance of the public office involved."[161]

In an effort to clarify the *Elrod* standard, Justice Stevens in *Branti* changed the fundamental inquiry to one more expansive in its protection from patronage dismissals of public employees. While the *Elrod* standard is concrete and particular in nature in that the actual duties of the employee are examined, the *Branti* standard is abstract and general because the position itself is viewed theoretically, without regard for the actual duties performed by the occupant.[162] Under *Elrod*, an employee could be considered policymaking or confidential because of his actual conduct or other duties.[163] However, such a disqualification from protection presumably could not occur under *Branti* because the position is viewed in the abstract without considering the role of the individual.[164] Ostensibly the Court recognized the difficulty of utilizing the *Elrod* standard and, as the legal community had advocated,[165] revised the standard in *Branti* to meet this criticism.

Two reasons compel this conclusion. First, the expansive nature of the *Branti* holding, unlike that of *Elrod*, involved a narrower level of review emphasizing only the primary duty of the targeted office.[166] Thus, the public office under *Branti* cannot be scrutinized as closely as was the public employee under *Elrod*. Because many positions marginally involve both nonpolitical and political duties, fewer partisan responsibilities will be detected and the resulting permissible class of dischargeable employees will be reduced.[167] Second, the *Branti* dissent conceded that the majority enlarged the protected class of employees when Justice Powell described the revised standard as "sweeping," "broad," and "substantially expanded."[168]

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[160]427 U.S. at 368.
[161]445 U.S. at 518.
[162]*See* notes 164 & 165 *infra*.
[163]427 U.S. 347.
[164]445 U.S. 507.
[165]*See* notes 117-23 *supra* and accompanying text.
[166]445 U.S. at 518.
[167]*Id.*
[168]*Id.* at 522-24 (Powell, J., dissenting).

In a subsequent public employee dismissal case, *Farkas v. Thornburgh*,[169] a federal district court elaborated upon the conclusion that the revised *Branti* standard increased public employee protection against patronage dismissals.[170] Agreeing that the protected class had been expanded, the district court observed that while "*Branti* did not expressly overrule *Elrod*, *Branti* certainly made unconstitutional dismissals which would have passed muster under *Elrod*."[171]

A second major criticism of *Elrod* involved the uncertainty surrounding the breadth of the Court's holding.[172] The *Elrod* plurality spoke in broad terms as to the general unconstitutionality of all patronage practices.[173] But the concurrence limited the holding to proscribe only patronage dismissals and expanded the policymaking distinction to include the confidentiality inquiry.[174] The Court in *Branti* adopted the confidentiality distinction enunciated in the concurrence without discussion.[175]

As to the scope of the holding in *Branti*, no limiting language such as that found in the *Elrod* concurrence was present. In a footnote, the Court did refuse to rule on the dismissability of a deputy prosecutor.[176] Noting the broader public duties of a prosecutor as compared to a public defender, the majority in *Branti* expressly offered no opinion on the constitutionality of the political discharge of such an employee.[177]

Significantly, the Court did address one other patronage practice, thereby implying that it, too, may be unconstitutional. The Court observed the difficulty of conceiving any justification for conditioning upon partisan grounds the hiring of an assistant public defender.[178] The Court quoted with approval the following statement of the district court:

> Perhaps not squarely presented in this action, but deeply disturbing nonetheless, is the question of the propriety of political considerations entering into the selection of attorneys to serve in the sensitive positions of Assistant

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[169]493 F. Supp. 1168 (E.D. Pa. 1980), *aff'd without opinion*, 642 F.2d 441 (3d Cir. 1981).

[170]*Id.* at 1179 n.23.

[171]*Id.*

[172]*See* notes 103-13 *supra* and accompanying text.

[173]*See* notes 80-83 *supra* and accompanying text.

[174]*See* notes 92-94 *supra* and accompanying text.

[175]445 U.S. at 518.

[176]*Id.* at 519 n.13.

[177]*Id.*

[178]*Id.* at 520 n.14.

> Public Defenders. By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime? No "compelling state interest" can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans).[179]

Justice Powell writing for the dissent agreed that the majority had, in dicta, proscribed the patronage practice of partisan-motivated hiring of assistant public defenders.[180]

Although *Branti* has "expanded the immunity of non-civil service employees from patronage dismissals, it has left the contours of the broadened constitutional protections somewhat unclear."[181] The procedure by which an employee obtains this protection is fortunately not so obscure. The burden of proof rests upon the plaintiff-employee to demonstrate by a preponderance of the evidence that the public employer discharged or threatened to discharge him solely because of his political affiliation.[182] The burden of going forward then shifts to the public authority to establish one of two justifications.

Using the *Branti* abstract standard, the authority can justify its conduct by showing that party membership was essential to the effective performance of the position.[183] Alternatively, the public authority can demonstrate that a permissible apolitical motivation prompted the dismissal. Utilizing the *Mount Healthy* "but for" test,[184] the public authority may carry its burden of going forward, even if an impermissible motivation exists, by showing that the primary motive for discharge lacked any unconstitutional quality.[185] Under the *Mount Healthy* analysis, in order for a motivation to be considered permissible it must advance a governmental rather than a partisan interest.[186] Thus, even if specific political affiliation is required to effectively perform the duties of the position, the dismissal would be unconstitutional and the justification would fail if the motivation were based upon partisan rather than governmental considerations.

Finally, if the claimed constitutional infringement involves patronage practices other than those involved in hiring or discharge,

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[179]*Id.* (quoting Finkel v. Branti, 457 F. Supp. 1284, 1293 n.13 (S.D.N.Y. 1978)).

[180]445 U.S. at 524.

[181]G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1479 (10th ed. 1980).

[182]445 U.S. at 517.

[183]*Id.*

[184]*See* notes 124-27 *supra* and accompanying text.

[185]429 U.S. at 287.

[186]427 U.S. at 362.

the Court will employ strict judicial scrutiny, rather than the abstract *Branti* dischargeability standard, and balance those first and fourteenth amendment rights diminished against the state interests being upheld.[187]

Branti has successfully met the criticisms of *Elrod* in several respects. The abstract standard enunciated in *Branti* has decreased the difficulty of distinguishing between policymaking-nonpolicymaking and confidential-nonconfidential employees.[188] This is because application of an abstract standard in which the position in question is viewed hypothetically not only expands the scope of immunity but also relieves the fact finder of the need to examine the actual duties performed by the employee proposed for termination.[189]

Criticism that *Elrod* left unspecified the breadth of its application was also addressed in part by *Branti*. The Court in *Branti* reiterated the view that dismissal of public employees based solely on political affiliation is impermissible despite the apparent absence of coercion to change party membership.[190] The Court also cited with approval language which invalidated the use of partisan considerations in the hiring of employees for positions where specific political affiliation was not relevant to effective performance of the duties of the office.[191] The Court did not, however, address other patronage practices such as the failure to rehire and the distribution of other nonemployment benefits.[192]

The Court's retreat from the concrete standard expressed in *Elrod* was not altogether unpredictable.[193] An analgous standard was employed by the Court in *Barr v. Mateo*[194] in which public officials were clothed with an immunity from defamation claims.[195] In that opinion the Court fashioned a discretionary-nondiscretionary distinction to ascertain whether a public employee was operating within the proper scope of his authority.[196] The distinction underwent

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[187]*Id.*

[188]*See* Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980) (strict scrutiny and balancing of interests employed on basis of freedom of speech in reviewing dismissal of public employee).

[189]*See* notes 163-64 *supra.*

[190]445 U.S. at 516-17.

[191]*See* notes 178-79 *supra* and accompanying text.

[192]445 U.S. at 513 n.7.

[193]*See* Note, *Patronage Dismissals and Compelling State Interests: Can the Policymaking/NonPolicymaking Distinction Withstand Strict Scrutiny?*, 1978 S. ILL. U.L.J. 278, 296-300.

[194]360 U.S. 564 (1959).

[195]*Id.*

[196]*Id.* at 572-74. In that opinion, Justice Harlan enunciated the following rather vague standard to be employed:

The privilege is not a badge or emolument of exalted office, but an expres-

substantial criticism for its vagueness and was ultimately revised in *Scheuer v. Rhodes*.[197] In *Scheuer*, the Court shifted from an analysis of the individual duties performed by the officer to an abstract inquiry concerning the office. The essentially theoretical standard provided that "a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action . . . ."[198] By analogy it may be inferred that the vagueness created by both *Elrod* and *Barr* in establishing a concrete standard ultimately led to substitution of an abstract inquiry to make obtainable the desired immunity for public employees.

Despite revision of the *Elrod* standard, the *Branti* opinion failed in two significant respects. First, under the revised standard of dischargeability, the contours of the newly created class of protected employees are unduly vague and will result in inconsistent lower court decisions.[199] The dissenters in *Branti* described the confusion expected to confront public officials, legislators, and prospective public employees when they stated that those groups "who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position."[200] The majority in *Branti* apparently did not recognize the potential for confusion arising from its holding.[201]

Second, and even more fundamental, the majority in *Branti* ignored the depreciating effect of its expansive decision on the stability of national political parties.[202] This absence of justification was vigorously criticized by the dissent. Justice Powell warned that

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sion of a policy designed to aid in the effective functioning of government. . . .

. . .

To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to "matters committed by law to his control or supervision," . . .—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits.

Id. (citation omitted).

[197]416 U.S. 232 (1974).

[198]*Id.* at 247.

[199]G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1479 (10th ed. 1980).

[200]445 U.S. at 524 (Powell, J., dissenting).

[201]*Id.* at 507 (Stevens, J., for the Court).

[202]*Id.* at 532 (Powell, J., dissenting).

Branti will impair the role of political parties in fostering national goals, and concluded that the quality of government will suffer "when candidates and officeholders are forced [as a result of *Branti*] to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy."[203] Justice Powell theorized that this insensitivity to the value of political parties will contribute to a factionalized, multiple-party system of government.[204]

IX. Judicial Interpretation of the *Branti* Prohibition of Patronage Practices

Cases interpreting the changes resulting from *Branti* have generally fallen into one of two categories: (1) cases which have recognized the expansion of public employee rights under *Branti*; and (2) cases in which *Elrod-Branti* immunities are not available.[205]

In the case of *Delong v. United States*,[206] the court interpreted the breadth of the *Branti* holding as significantly expanding the scope of public employee protection to include other patronage practices. The court recognized that a valid cause of action existed for the political reassignment and transfer of existing employees because of infringement of first amendment rights.[207] As discussed above, the court in *Farkas v. Thornburgh*[208] described the *Branti* standard of dischargeability as more expansive than the *Elrod* standard because of the change in focus from a concrete to an abstract inquiry.[209]

In *Blameuser v. Andrews*,[210] the Seventh Circuit Court of Appeals held that refusal to admit the plaintiff to an Army ROTC program was based on his Nazi sympathies.[211] The court reasoned that the state interest in recruiting qualified candidates to be officers

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[203]*Id.* (Powell, J., dissenting).

[204]*Id.* at 528 (Powell, J., dissenting).

[205]Several courts have held that the plaintiff-employee failed to carry the initial burden of proof. In *Farkas v. Thornburgh*, 493 F. Supp. 1168 (E.D. Pa. 1980), *aff'd without opinion*, 642 F.2d 441 (3d Cir. 1981), the court ruled that the plaintiff had performed at a substandard level and that the plaintiff's successor was competent and able. *Id.* at 1178. *Aufiero v. Clarke*, 489 F. Supp. 650 (D. Mass. 1980), involved a plaintiff who established a prima facie case of discharge based on political activity, but who did not establish that the political activity was constitutionally protected and accordingly failed to carry the burden of proof. *Id.* at 652.

[206]621 F.2d 618 (4th Cir. 1980).

[207]*Id.* at 624.

[208]493 F. Supp. 1168.

[209]*Id.* at 1179 n.23.

[210]630 F.2d 538 (7th Cir. 1980).

[211]*Id.*

justified burdening the first amendment in a way which would be impermissible if civilians were involved.[212]

In *Bavoso v. Harding*,[213] a federal district court ruled that a municipal corporation counsel did not qualify for immunity under *Branti*. Because the selection process to hire municipal counsel statutorily required approval by the mayor and a majority of the legislative council, the court reasoned that it was essentially a political process outside the scope of *Branti*.[214]

Bavoso raises the question of whether the patronage practice prohibitions under *Branti* could be completely circumvented by merely dedicating the selection, appointment, and termination of all public employees to such a political process. The mechanics would simply involve a statute requiring the approval of the executive and legislative branches of a governmental entity in making fundamental personnel decisions.[215] However, the district court in *Bavoso* implicitly suggested that a municipal corporation counsel could permissibly be removed for political reasons under the *Branti* analysis.[216] For this reason, it appears that the court would not extend its "dedicated to a political process" rationale to permit the political hiring or dismissal of public employees who qualify for protection under *Branti*.[217] However, the court's holding is not so explicitly limited, allowing for the possibility that such an argument may successfully be made.

These subsequent lower court cases indicate that initially the *Branti* standard has been correctly interpreted as expanding both the standard of dischargeability established by *Elrod* and the breadth of the *Elrod* holding.[218] But the potential for uncertainty illustrated by *Bavoso* indicates that officials and employees of public authorities will recurringly be without guidance in determining whether political affiliation is an appropriate requirement to fulfill the responsibilities of a given public office.[219]

X. Conclusion

The thesis of this Note is that while *Branti* has expanded the first amendment freedom of association in its application to public employees, providing protection against patronage-motivated em-

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[212]*Id.* at 542.

[213]507 F. Supp. 313 (S.D.N.Y. 1980).

[214]*Id.* at 316.

[215]*Id.* at 314.

[216]*Id.* at 316.

[217]*Id.*

[218]*See* Tanner v. McCall, 625 F.2d 1183, 1189-96 (5th Cir. 1980).

[219]*See* notes 199-201 *supra* and accompanying text.

ployment practices, the revised standard is unduly vague and will result in inconsistent lower court decisions. As exemplified by *Bavoso*, the availability of *Branti's* protection may be difficult to predict. For this reason, it may be said that while *Branti* has significantly increased the class of public employees shielded from patronage practices, the resulting protections do not approximate a civil service system on a national basis.

DAVID W. STEED

Recent Development

Section 1983 and Statute-Based Non-Equal Rights Claims: Comity and Jurisdictional Requirements

I. INTRODUCTION

The federal judiciary, faced with monumental caseloads,[1] has in recent years been forced to engage in some creative jurisdictional decision-making in order to fill the cracks which occasionally appear in those ever-feared "floodgates of litigation." This Recent Development focuses on the jurisdictional treatment of one class of federal claims which, although not great in number, has been growing at an accelerating rate.[2] The claims treated herein are brought pursuant to section 1983 of Title 42.[3] The jurisdictional grant, which does not require a minimum amount in controversy, is based upon section 1343 of Title 28.[4] Specifically, these are claims which allege a deprivation under color of state law of rights created by federal statutes which do not provide for equal rights. The rights sought to be protected are generally created by statutory provisions which encourage states to participate in programs of "cooperative federalism."[5] Rights arising under the Social Security Act[6] constitute one example.

Three alternative barriers have been constructed in federal case

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[1]*See* notes 15-27 *infra*.

[2]*See* notes 17-18 *infra* and accompanying text.

[3]Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

[4]Section 1343(3) provides:

> The district courts shall have original juridiction of any civil action authorized by law to be commenced by any person:
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> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. § 1343 (1976).

[5]Justice Powell provided an extensive list of such programs in the appendix to his dissenting opinion in Maine v. Thiboutot, 448 U.S. 1, 34-37 (1980).

[6]42 U.S.C. §§ 301-1305 (1976).

law to exclude from federal forums statute-based section 1983 claims not alleging equal rights violations. Two of these jurisdictional checks were developed in separate concurring opinions in *Chapman v. Houston Welfare Rights Organization*[7] in which the Supreme Court decided that section 1343 was not available to provide jurisdiction over purely statutory claims. Justice Powell wrote in his concurring opinion that section 1983 itself should not even provide a remedy for the deprivation under color of state law of these statutory rights.[8] Justice White, however, believed that section 1983 did indeed provide the remedy sought and that a federal forum should be available to plaintiffs with statute-based section 1983 claims as long as they could satisfy the amount in controversy requirement of section 1331 of Title 28.[9] Shortly afterward, in *Maine v. Thiboutot*,[10] the Court adopted Justice White's position. Just as federal case law developed which would have prevented plaintiffs from bringing their non-equal rights statute-based section 1983 claims in federal court pendent to constitutional claims, Congress stepped in and eliminated the jurisdictional amount requirement of section 1331.[11] The effect of this new statute was to throw down the barriers set up in *Chapman* and *Thiboutot*, opening the federal courts to all persons with claims arising under federal laws.

Although elimination of the amount in controversy requirement may indeed put the law of federal jurisdiction "on a more principled basis,"[12] it is apparent that the federal courts are ill-equipped to deal with any influx of litigants. In view of the disposition of the courts to reduce the federal caseload, a recent Fifth Circuit decision, *Patsy v. Florida International University*,[13] may reconcile the mood of the federal courts with the new jurisdictional scheme. In a comprehensive and well-reasoned opinion, the court rejected the view that exhaustion of state administrative remedies should never be required before a plaintiff may file his section 1983 claim in a federal court.[14] Although less effective than a flat denial of federal jurisdiction over non-equal rights, statute-based section 1983 claims, an exhaustion of adequate state administrative remedies requirement would at least limit the number of such cases heard in federal courts.

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[7]441 U.S. 600 (1979).

[8]*Id.* at 623-46.

[9]*Id.* at 658 (referring to 28 U.S.C. § 1331 (Supp. III 1979)).

[10]448 U.S. 1.

[11]28 U.S.C. § 1331 (Supp. III 1979), *as amended by* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980).

[12]S. REP. No. 96-827, 96th Cong., 2d Sess. 16 (1980) (letter from Professor Charles Allen Wright to Hon. Robert W. Kastenmeier, House Committee on the Judiciary).

[13]634 F.2d 900 (5th Cir. 1981).

[14]*Id.* at 912.

This Recent Development discusses the overworked federal court system's attempt to cope with the growing number of section 1983 actions filed each year. Following a brief examination of the expanding caseload of the federal judiciary is a discussion of the cases which reflect the federal courts' current view of statute-based section 1983 claims. The amendment of section 1331 eliminated the amount in controversy requirement for general federal question jurisdiction and the need for plaintiffs to fight for jurisdiction under section 1343. The purposes behind the amendment will be examined. Finally, the effect of requiring exhaustion of administrative remedies before filing a section 1983 claim will be analyzed.

II. THE BURGEONING FEDERAL CASELOAD

Over the past two decades, the number of civil cases filed each year in federal courts[15] has increased at an alarming rate.[16] As Judge Friendly has pointed out, this figure rose 23% between 1961 and 1968.[17] In 1976, the annual figure was 83% higher than in 1968.[18] Since 1976, however, the rate of increase has slackened somewhat, but the number of civil actions filed in 1980 was still 29% higher than the number four years earlier.[19] In an attempt to keep pace with this "mad rush to the federal courts,"[20] Congress increased the number of federal judgeships[21] from 245 in 1960[22] to 516 in

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[15]In 1961, approximately 58,000 civil cases were filed in federal courts, excluding bankruptcy proceedings. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15 (1973). This reflected a substantial decrease in the number of cases filed per year since the passage of Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (1958) (amending 28 U.S.C. §§ 1331, 1332 (1952)) which raised to $10,000 the jurisdictional amount of diversity and federal question claims. *Id.* at 15 & n.2.

[16]*See* FRIENDLY, *supra* note 15, at 15-31; Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW AND THE SOCIAL ORDER 557, 558-59 (1973); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); Address by Chief Justice Warren E. Burger, ABA Annual Meeting (August 14, 1972), *reprinted in* 58 A.B.A.J. 1049, 1049 (1972); Address by Chief Justice Earl Warren, ALI Annual Meeting (May 20, 1959), *reprinted in* 36 ALI PROCEEDINGS 27, 29-33 (1959).

[17]In 1968, 71,449 civil cases were filed in federal courts. FRIENDLY, *supra* note 15, at 15-16.

[18]In 1976, 130,597 civil cases were filed in federal courts. *Annual Report of the Director of the Administrative Office of the United States Courts* 293-94 (1976) [hereinafter cited as *1976 Annual Report*].

[19]In 1980, 168,789 civil cases were filed in federal courts. *Annual Report of the Director of the Administrative Office of the United States Courts* 55 (1980) [hereinafter cited as *1980 Annual Report*].

[20]Aldisert, *supra* note 16, at 559.

[21]Article III, § I of the United States Constitution provides in part that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

[22]FRIENDLY, *supra* note 15, at 16.

1980.[23] Unfortunately, this more than doubling of the federal judiciary has not checked the overcrowding of the federal dockets. In fact, the number of civil cases per district judgeship has increased from 242 in 1960[24] to 327 in 1980.[25]

Some suggestions aimed at reducing the federal caseload through congressional action have been made,[26] but have been without substantial impact. The courts themselves took the first steps toward shutting out of federal courts most section 1983 claims based on the deprivation, under color of state law, of rights created by federal statute.[27]

III. A Trend in the Case Law

A. *Limited Federal Jurisdiction Over Section 1983 Claims:* Chapman v. Houston Welfare Rights Organization[28]

Chapman was a consolidation of two actions brought in the federal courts.[29] In each action, the plaintiff claimed injury as a

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[23]*1980 Annual Report*, *supra* note 19, at 2.

[24]*Id.* at 3.

[25]*Id.*

[26]The following recommendations have been offered: (1) Abolishing diversity jurisdiction. *Federal Diversity of Citizenship Jurisdiction: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 397 (1975); *Warren Address*, *supra* note 16, at 33-34 (calling for a study focusing on the achievement of a proper jurisdictional balance between state and federal courts). *Contra*, Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963); (2) Establishing a National Court of Appeals. 67 F.R.D. at 199, 208; (3) Increasing the number of district court judges. *Id.* at 274; and (4) Expanding federal magistrate jurisdiction. *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

[27]While only 19 decisions based on § 1983 are noted in the 1964 U.S.C.A. for the first 65 years of the statute's history, over 700 cases are cited in the 1976 U.S.C.A. Note, *Remedies for Statutory Violations Under Sections 1983 and 1985(c)*, 37 WASH. & LEE L. REV. 309, 309 n.1 (1980). *See also Thiboutot* at 27 n.16 (Powell, J. dissenting).

As a percentage of total civil cases filed in federal courts in 1961, the private civil rights action amounted to only 0.5%. *Annual Report of the Director of the Administrative Office of the United States Courts* 238 (1961) [hereinafter cited as *1961 Annual Report*]. By 1968, private civil rights actions constituted 2% of all civil actions filed. *Annual Report of the Director of the Administrative Office of the United States Courts* 194-95 (1968). By 1980, the percentage had risen to 7%. *1980 Annual Report*, *supra* note 19, at 55. Even more striking are the raw numbers: 270 private civil actions were filed in 1961, *1961 Annual Report* 238, compared with 11,495 in 1980, *1980 Annual Report* at 55.

[28]441 U.S. 600.

[29]*See* Gonzalez v. Young, 560 F.2d 160 (3d Cir. 1977), *aff'd sub nom.* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Houston Welfare Rights Org. v.

result of state welfare regulations which allegedly conflicted with the Social Security Act.[30] The actions were brought pursuant to section 1983 and its jurisdictional counterpart, section 1343(3) of Title 28.[31] The only question facing the Court in *Chapman* was whether the district courts had jurisdiction to hear "a claim that a state welfare regulation was invalid because it conflicted with the Social Security Act."[32] The Court held that the district courts had no jurisdiction.[33] Justice Stevens, writing for the Court, reviewed the history of section 1343(3) and concluded that "the legislative history of the provisions at issue in the case ultimately provides . . . little guidance as to the proper resolution of the question presented . . . ."[34] The Court examined the Supremacy Clause,[35] section 1983,[36] and the Social Security Act[37] and in each case failed to find the rights required by section 1343.[38]

B. The Scope of Section 1983

1. Justices White and Powell: The Conflict in Chapman.—The Court held that *Chapman* could be disposed of without considering the scope of section 1983. The conclusions reached in the concurring opinions by Justices Powell and White followed lengthy accounts of the legislative histories of the two statutes[39] and were drawn in light of recent decisions.[40]

Justice Powell was of the opinion that only one conclusion could be reached: Sections 1983 and 1343(3) were coextensive.[41] The use by Congress of the words "and laws" in section 1983, the Justice reasoned, was a shorthand method of referring to equal rights legislation,[42] and therefore section 1983 was never intended to provide a

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Vowell, 555 F.2d 1219 (5th Cir. 1977), *rev'd sub nom.* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).

[30]Social Security Act, 42 U.S.C. §§ 301-1305. In *Vowell*, the plaintiffs alleged the deprivation under color of state law of rights created by the Social Security Act, § 402, 42 U.S.C. § 602 (1976). 555 F.2d at 1221. The plaintiffs in *Young* asserted the Social Security Act § 406(e)(1), 42 U.S.C. § 606(e)(1) (1976), as the source of the federal rights of which they had been deprived by state action. 560 F.2d at 163.

[31]*See* notes 3 & 4 *supra.*

[32]441 U.S. at 603.

[33]*Id.* at 610.

[34]*Id.* at 612.

[35]*Id.* at 612-15.

[36]*Id.* at 618-20.

[37]*Id.* at 620-27.

[38]28 U.S.C. §1343(3) (1976).

[39]*See* 441 U.S. at 623, 646 (concurring opinions of Powell & White, JJ.).

[40]*Id.* at 624-46, 647-72 (concurring opinions of Powell & White, JJ.).

[41]*Id.* at 624 (Powell, J., concurring).

[42]*Id.*

remedy for the deprivation of federal statutory rights.[43] Justice White, in contrast, contended that the legislative history of section 1983 reflects congressional intent that the remedy encompass federal non-equal statutory rights.[44]

Justice Powell was influenced by the potential "dramatic expansion of federal court jurisdiction"[45] which would be caused by a broad interpretation of section 1983. Because Justice Powell concurred with the Court that section 1343(3) provided jurisdiction only for section 1983 claims based upon the Constitution or upon statutes providing for equal rights, it initially seems incongruous that he would foresee "a dramatic expansion of federal court jurisdiction."[46] Certainly, after *Chapman*, the only provisions left for direct federal jurisdiction over statutory section 1983 claims not involving equal rights were the diversity[47] and general federal question[48] enactments. Although he did not discuss it, Justice Powell apparently feared a rush of such claims brought pendent to constitutional claims pursuant to the rationale of *Hagans v. Lavine*.[49] Justice White did note the possibility that the plaintiffs could have their non-equal rights statute-based section 1983 claims heard in federal court on remand under the *Hagans* doctrine, implicitly recognizing that his construction could precipitate an increased number of such filings in federal court.[50]

2. Maine v. Thiboutot:[51] *A Broad Construction of Section 1983.*—The debate between Justices White and Powell in *Chapman* proved to be a prelude to *Thiboutot*, in which the issue of the scope of section 1983 was finally put squarely before the Court.[52] In *Thiboutot*, the Court approved the broader interpretation advocated by Justice White in *Chapman*. Justice Brennan, writing for the majority, concluded that section 1983 did provide a remedy for the deprivation, under color of state law, of rights created by federal statutes which do not provide for equal rights.[53]

Justice Powell wrote the dissent, joined by the Chief Justice and Justice Rehnquist. Recapitulating his version of the legislative history of section 1983, Justice Powell again asserted that the words

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[43]*Id.* at 627.
[44]*Id.* at 649 (White, J., concurring in the judgment).
[45]*Id.* at 645 (Powell, J., concurring).
[46]*Id.*
[47]28 U.S.C. § 1332 (1976).
[48]28 U.S.C. § 1331 (Supp. III 1979).
[49]415 U.S. 528 (1974).
[50]441 U.S. at 661 & n.33 (White, J., concurring in the judgment).
[51]448 U.S. 1.
[52]*Id.* at 3.
[53]*Id.* at 4-8.

"and laws" were "nothing more than a shorthand reference to equal rights legislation enacted by Congress."[54]

Although *Thiboutot* was originally brought in a state court, the primary concern of the dissenters again appears to have been the heavy federal caseload.[55] Justice Powell also expressed reservations that the majority's broad interpretation of section 1983 "creates a major new intrusion into state sovereignty under our federal system."[56] To be sure, Justice Powell's approach would help ease the pressure on federal courts, but would itself create a significant federalism problem. Doing away with the non-equal rights statute-based section 1983 action would eliminate a remedy which would otherwise be available to plaintiffs in state courts.[57] Further, because there would be no available federal remedy, even under diversity and general federal question jurisdiction, the dissenters seemed to be suggesting that Congress created certain federal rights with the knowledge that there was no available remedy. The position first articulated by Justice White in *Chapman*, and ultimately adopted by the Court in *Thiboutot*, however, did contemplate congressional intent to provide for redress of acts under color of state law inconsistent with these statutory rights. The result of *Chapman* and *Thiboutot* is that plaintiffs in non-equal rights statute-based section 1983 actions can bring their actions in federal court under federal question or diversity jurisdiction.[58] In addition, the section 1983 remedy is preserved for use by aggrieved parties in state courts. This outcome seems to strike a better balance between state and federal interests than does the position advanced by Justice Powell.

C. Hagans v. Lavine:[59] *Pendent Jurisdiction for Non-Equal Rights Statute-Based Section 1983 Claims*

Unfortunately for the overworked lower federal courts, the pendent jurisdiction doctrine of *Hagans v. Lavine* has prevented

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[54]*Id.* at 12 (Powell, J., dissenting).

[55]The Chief Justice, it will be remembered, has long called for an easing of the federal caseload. *See* COMMISSION ON REVISION, note 26 *supra* (letter from the Chief Justice).

[56]448 U.S. at 33 (Powell, J., dissenting).

[57]In Martinez v. California, 444 U.S. 277, 283 n.7 (1980), the Court held that Congress has not barred state courts from hearing section 1983 claims but reserved the question of whether state courts are obligated to hear section 1983 claims. *See* Testa v. Katt, 330 U.S. 386, 391 (1947) (compelling state enforcement of federal statutes). *See also* Terry v. Kolski, 78 Wis. 2d 475, 254 N.W.2d 704 (1977).

[58]28 U.S.C. § 1331 (Supp. III 1979), *as amended by* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2360 (1980). *See* notes 79-86 *infra* and accompanying text for the effect of the amendment.

[59]415 U.S. 528.

Chapman and *Thiboutot* from reducing the federal caseload. In *Hagans*, the district court found pendent jurisdiction over a statutory claim brought purusant to section 1983.[60] The plaintiff alleged that New York regulations contravened certain provisions of the Social Security Act.[61] The district court found that jurisdiction existed pendent to a claim that the same state regulations violated the equal protection clause of the fourteenth amendment.[62] The Court of Appeals for the Second Circuit revised for failure to present a substantial constitutional claim.[63] The Supreme Court granted certiorari[64] and held that the statutory claim could be heard pendent to the constitutional claim because the latter was not wholly unsubstantial.[65]

In *Chapman*, both Justice White, in his concurring opinion,[66] and Justice Stewart, in his dissent,[67] noted that the Court's holding did not cast doubt upon the continued validity of the *Hagans* pendent jurisdiction rationale.[68] In fact, in the wake of *Chapman*, most plaintiffs have brought their statute-based section 1983 actions pendent to constitutional claims.[69] With few exceptions,[70] the lower courts have held that the constitutional claims satisfy the substantiality test of *Hagans*. These cases are generally disposed of on the merits of the statutory claims without addressing the substantive constitutional issues presented.[71] In sum, it makes little sense to close one

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[60]*Id.* at 532.

[61]*Id.* at 530-31.

[62]*Id.* at 531-33.

[63]*Id.* at 533.

[64]*Id.*

[65]*Id.* at 539. Substantial claims have been defined in earlier decisions as claims not rendered frivolous by prior decisions or "so attenuated and unsubstantial as to be absolutely devoid of merit." *Id.* at 536 (quoting Newburyport Water Co. v. Newburyport, 193 U.S. 561 (1904)).

[66]441 U.S. at 646 (White, J., concurring in the judgment).

[67]*Id.* at 672 (Stewart, J., dissenting).

[68]*Id.* at 661 n.3 (White, J., concurring in the judgment); *Id.* at 675 (Stewart, J., dissenting).

[69]*See, e.g.*, Miller v. Youakim, 440 U.S. 125 (1979) (claim that Illinois regulations used to administer the Aid to Families with Dependent Children-Foster Care program, Social Security Act, §§ 401, 408, 42 U.S.C. §§ 601, 608 (1976), violated the plaintiff's equal protection rights under the fourteenth amendment held substantial enough to support statutory 1983 claim). *See also* Oldham v. Ehrlich, 617 F.2d 163 (8th Cir. 1980); McManama v. Lukhard, 616 F.2d 727 (4th Cir. 1980).

[70]*See, e.g.*, Doe v. Klein, 599 F.2d 338 (9th Cir. 1979) (plaintiff's constitutional claims were "totally without merit" and "asserted in order to obtain jurisdiction over her statutory claim." Therefore, there was no basis for the exercise of pendent jurisdiction).

[71]The court noted in *Hagans* that "the Court has characteristically dealt with the 'statutory' claim first because if the appellee's position on this question is correct, there is no occasion to reach the constitutional issues." 415 U.S. at 549 (citations omitted).

jurisdictional door on a category of claims only to have such claims come in through another.

D. Aldinger v. Howard:[72] *Mitigating the Effect of* Hagans

Even before *Chapman* was decided, a line of cases began to develop which might prevent claimants under section 1983 from having their non-equal rights statutory claims heard pendent to constitutional claims brought pursuant to section 1343. In *Aldinger v. Howard*,[73] the Supreme Court concluded that pendent party claims cannot be heard where Congress has made it clear that the party sought to be brought into the action was never intended to be subject to such claims.[74]

The district court in *Kedra v. City of Philadelphia*[75] extended the *Aldinger* analysis to include pendent claims: "The statute conferring jurisdiction over the federal claim may expressly or impliedly restrict the scope of the cause of action that may be litigated under it, precluding litigation of a complete 'case' in the constitutional sense."[76]

Applying this analysis to sections 1983 and 1343(3), the implication, after *Chapman*, is that section 1343 was intended to confer jurisdiction over constitutional and equal rights statutory claims only,[77] and that pendent jurisdiction over non-equal rights statutory claims is therefore precluded. Refusal by federal courts to hear these pendent claims would close another federal jurisdictional door while preserving for the claimants their state court section 1983 remedies.[78]

IV. The Federal Question Jurisdictional Amendments Act of 1980:[79] Congress Opens Yet Another Door

Thus far, the discussion has focused on whether non-equal

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[72]427 U.S. 1 (1976). *See generally* Aldinger v. Howard *and Pendent Jurisdiction*, 77 Colum. L. Rev. 127 (1977); Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 Nw. L. Rev. 245 (1980); Aldinger v. Howard: *Pendent Party Jurisdiction in Federal Question Cases*, 13 New England L. Rev. 170 (1977).

[73]427 U.S. at 1.

[74]*Id.* at 17 & n.12. *See also* New England, *supra* note 72 at 173.

[75]454 F. Supp. 652 (E.D. Pa. 1978). *See also* Wesley v. Mullins & Sons, Inc., 444 F. Supp. 117 (E.D.N.Y. 1978); Morgan v. Sharon, Pa. Bd. of Educ., 445 F. Supp. 142, 146 (W.D. Pa. 1978). *See also* Ensuring Access, *supra* note 72, at 281-83; *Pendent Jurisdiction*, *supra* note 72, at 148-52. *Contra*, Gagliardi v. Flint, 564 F.2d 112, 114 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

[76]454 F. Supp. at 680.

[77]*See* notes 28-38 *supra* and accompanying text.

[78]*See* note 57 *supra* and accompanying text.

[79]Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (amending 28 U.S.C. § 1331 (Supp. III 1979)).

rights statute-based section 1983 actions can properly be brought under section 1343, a specialized jurisdictional provision which requires no minimum amount in controversy.[80] Of course, section 1331,[81] the general federal question jurisdictional grant, has always been available to provide jurisdiction over claims which arise under federal law[82]—so long as the amount in controversy is at least $10,000.[83] Few claimants, however, can legitimately allege $10,000 in controversy in a section 1983 suit challenging state action on the ground that it is inconsistent with a federal statute which does not provide for equal rights.[84] Recently, Congress enacted the Federal Question Jurisdictional Amendments Act of 1980,[85] eliminating the amount in controversy requirement of section 1331.[86] As a result, individuals with non-equal rights statute-based section 1983 claims no longer must fight for federal jurisdiction under section 1343.

A. The Need for Reform

The jurisdictional amount has existed in one form or another since the early days of the Republic.[87] It was originally intended to prevent congestion in federal courts,[88] but history had demonstrated the fallacy of that early reasoning.[89] Today, specialized statutory enactments confer jurisdiction over almost every kind of case arising under the Constitution and laws of Congress.[90] Interestingly, the proponents of the recent amendment predicted that the elimination of the amount in controversy would reduce the time spent on each case.[91]

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[80]28 U.S.C. § 1334 (1976).

[81]28 U.S.C. § 1331 (Supp. III 1979).

[82]*Id.*; C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 17 (3d ed. 1976).

[83]28 U.S.C. § 1331 (Supp. III 1979).

[84]The majority of these claims are based upon rights conferred by the Social Security Act. *See Chapman*, 441 U.S. at 606; SENATE REPORT, *supra* note 12, at 3; Note, *Jurisdiction Under 28 U.S.C. § 1343 Does Not Include Statutorily Based Claims of Welfare Rights Depriviation*—Houston Welfare Rights Organization, 29 DEPAUL L. REV. 883 (1980).

[85]The Act amends Section 1331 of Title 28, United States Code, to provide in part that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (1980).

[86]*Id.* at § 2(b).

[87]*See* WRIGHT, *supra* note 82, at 122.

[88]*Id.*

[89]*Id.* (quoting Chief Justice Earl Warren, Address to the ALI (May 18, 1960), 25 F.R.D. 213).

[90]H.R. REP. NO. 1461, 96th Cong., 2d Sess., 2 (1980). *See e.g.*, 28 U.S.C. § 1333 (1976) (admiralty, maritime and prize cases); 28 U.S.C. § 1334 (1976) (bankruptcy cases); 28 U.S.C. § 1337 (1976) (interstate commerce cases); 28 U.S.C. § 1338 (1976) (patent, copyright and trademark cases); and 28 U.S.C. § 1339 (1976) (postal matters).

[91]SENATE REPORT, *supra* note 12, at 7.

> Although there may be a minimal increase in the number of Federal question cases heard in Federal courts, the committee believe[d] that this [would] be more than offset by relieving the courts of the complicated and at times burdensome task of ascertaining whether the amount in controversy requirement [is] met in particular cases and of measuring that amount if so.[92]

It is doubtful that the elimination of the jurisdictional amount requirement would result in a reduction in the number of non-equal rights statutory section 1983 actions heard in federal courts. First, because of the limited scope of section 1343, these cases do not fall within the provisions of a specialized jurisdictional statute.[93] Further, the claimants rarely allege an amount in controversy approaching $10,000.[94] Contrary to the purpose stated by the Committee on the Judiciary,[95] the recent amendment seems to assure a federal forum for an entire class of actions which might otherwise be relegated to state courts.[96]

This result may be justified by policy considerations which run deeper than concern for the heavy yoke borne by the federal judiciary. As Professor Wright has stated: "We do nothing to encourage confidence in our judicial system or in the ability of persons with substantial grievances to obtain redress through lawful processes when we close the courthouse door to those who cannot produce $10,000 as a ticket of admission."[97] Many significant constitutional and statutory rights are incapable of monetary valuation. Aggrieved individuals, subject to a jurisdictional amount requirement, are effectively told that "their injury is too insignificant to warrant the attention of a Federal judge."[98] In turn, the state courts are apparently regarded "as inferior tribunals rather than a coordinate system."[99] The amendment to section 1331, therefore, generally promotes comity between the state and federal court systems by putting "the law of federal jurisdiction . . . on a more principled basis."[100]

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[92]*Id.*

[93]441 U.S. at 618.

[94]*See* note 84 *supra.*

[95]SENATE REPORT, *supra* note 12, at 3-5; HOUSE REPORT, *supra* note 90, at 1-3.

[96]*See* notes 28-78 *supra* and accompanying text.

[97]HOUSE REPORT, *supra* note 90, at 2 (quoting *Hearings before the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 254 (1970)).

[98]HOUSE REPORT, *supra* note 90, at 2.

[99]SENATE REPORT, *supra* note 12, at 13 (quoting ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* § 1311(a) at 174).

[100]SENATE REPORT, *supra* note 12, at 16 (letter from Professor Charles Allen Wright to Hon. Robert W. Kastenmeier, House Committee on the Judiciary).

B. Comity and the Statute-Based Section 1983 Action

Professor Wright has maintained that "suits challenging state or local action as in violation of the federal Constitution and statutes are exactly the sort of cases that should be heard by federal courts."[101] In *Chapman* and *Thiboutot*, however, the Supreme Court implied that there was no place in the federal district courts for non-equal rights statutory section 1983 actions; that state courts were the proper forums for adjudication of these cases. These divergent views can be reconciled by noting that the Supreme Court must work within the statutory scheme established by Congress and that commentators often advocate revision of these schemes.

Now that Congress has heeded the admonitions of Professor Wright and others, the *Chapman* decision pales in significance. The concurring opinions of Justices White and Powell remain interesting as background for the Court's decision in *Maine v. Thiboutot*. The amendment of section 1331 renders *Thiboutot* even more significant because it seems likely that more claimants will take advantage of section 1983 in order to have heard in federal courts their claims alleging the deprivation, under color of state laws, of federal statutory rights. Because federal case law has consistently preserved for section 1983 claimants the right to be heard in state courts, it seems unlikely that federal courts will be disposed to hear every section 1983 cause of action brought pursuant to section 1331. The Supreme Court, in *Thiboutot*, could have approved Justice Powell's view that section 1983 did not provide a remedy for the deprivation by state action of rights created by a federal non-equal rights statute,[102] but such a holding would have eliminated the section 1983 state court rememdy as well as the federal cause of action.[103] Even the cases which might have prevented claimants from alleging pendent jurisdiction in order to by-pass the *Chapman* decision contemplated the existence of state remedies.[104] Perhaps it is in the spirit of "cooperative federalism" that federal courts have sought to limit to state forums original jurisdiction over these claims, preferring to allow the states an opportunity to harmonize their activities with the federal statutory scheme relied upon by the claimants. Unfortunately, the Federal Question Jurisdictional Amendments Act of 1980 has minimized these notions of federalism in this particular category of actions. The Fifth Circuit, however, has recently articulated a view that might put the case law trend back on track by requiring

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[101] *Id.* at 15.

[102] *See* notes 54-58 *supra* and accompanying text.

[103] *Id.*

[104] *See* notes 66-71 *supra* and accompanying text.

claimants to exhaust state administrative remedies before bringing in federal court their non-equal rights section 1983 actions.[105]

V. COMITY AND THE EXHAUSTION OF ADMINISTRATIVE REMEDIES

It has long been the general rule that aggrieved parties must exhaust their state administrative remedies before filing an action in federal court.[106] There is conflicting authority, however, as to whether this doctrine ever applied to section 1983 claims. Although the Supreme Court has never had this issue placed squarely before it, there are several section 1983 cases in which the Court held that, under the facts of each case, exhaustion of administrative remedies was not required.[107] Members of the Court, however, have hinted that this exception to the exhaustion doctrine may not be iron-clad.[108] The circuit courts are evenly divided.[109] Until this year, the Fifth Circuit counted itself among the appellate tribunals which

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[105]Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir. 1981).

[106]Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159, 209-10 (1929). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 49, at 210 (3d ed. 1976); Note, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565 (1975).

[107]*See, e.g.*, Barry v. Barchi, 443 U.S. 55 (1979) (question of adequacy of available administrative remedies went to the merits of the plaintiff's case); Gibson v. Berryhill, 411 U.S. 564 (1973) (question of adequacy was identical with merits); Carter v. Stanton, 405 U.S. 669 (1972) (per curiam) (administrative remedies held inadequate); McNeese v. Board of Educ., 373 U.S. 668 (1963) (administrative remedies held inadequate).

[108]*E.g.*, Runyon v. McCrary, 427 U.S. 160 (1976).

> In some instances the Court has drifted almost accidentally into rather extreme interpretations of the post-Civil War Acts. The most striking example is the proposition, now often accepted uncritically, that 42 U.S.C. § 1983 does not require exhaustion of administrative remedies under any circumstances. This far-reaching conclusion was arrived at largely without the benefit of briefing and argument.

Id. at 186 n.* (Powell, J., concurring).

[109]Holding that exhaustion of state administrative remedies is never a prerequisite to a section 1983 action heard in federal court: Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979); Ricketts v. Lightcap, 567 F.2d 1226 (3d. Cir. 1977); Gillette v. McNichols, 517 F.2d 888 (10th Cir. 1975); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471; Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

Recognizing that the section 1983 exception to the exhaustion of administrative remedies doctrine is not invariably required: Raper v. Lucey, 488 F.2d 748, 751 n.3 (1st Cir. 1973); Eisen v. Eastman, 421 F.2d 560, 568 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970) (dictum); Patsy v. Florida Int'l Univ., 634 F.2d at 912; Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978); Canton v. Spokane School Dist. #81, 498 F.2d 840 (9th Cir. 1974) (exhaustion of state administrative remedies required if the plaintiff seeks to prevent a future invasion of civil rights); Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969) (exhaustion of administrative remedies not required if the plaintiff seeks redress for injuries already incurred).

did not require exhaustion of administrative remedies for federal jurisdiction over section 1983 actions.[110] In *Patsy v. Florida International University*,[111] the court held that the Supreme Court cases leave room for the development of "an analytical rule."[112]

A. The Analytical Rule: Exhaustion of Adequate State Administrative Remedies is Necessary in Section 1983 Actions

The Fifth Circuit did develop an analytical rule, holding that where administrative remedies are adequate and appropriate, exhaustion of those remedies is a prerequisite to bringing a section 1983 action in federal court.[113] Five minimum conditions must be met in determining whether the available administrative remedies are adequate:

> *First*, an orderly system of review or appeal must be provided by statute or written agency rule. *Second*, the agency must be able to grant relief more or less commensurate with the claim. *Third*, relief must be available within a reasonable period of time. *Fourth*, the procedures must be fair, and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims. *Fifth*, interim relief must be available in appropriate cases . . . ."[114]

If the minimum criteria are met, the court suggested further subjective considerations for the district courts. A proper balance must be struck, the court asserted, between the interests of the plaintiff and the value of the particular administrative scheme.[115]

The court was apparently referring to the policy reasons for its analytical approach. In discussing these policy grounds, the court cautioned that "[t]he proper focus [of the inquiry] should be on relief from wrong, and the adequacy of the administrative . . . remedy, not on the federal origin of the right that was violated."[116] The court then listed several considerations: First, exhaustion results in a more economical allocation of scarce judicial resources.[117] Next, it ensures that the claim is "ripe for adjudication."[118] Further, exhaustion provides an incentive for the administrative agency to comply with federal law.[119]

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[110]Patsy v. Florida Int'l Univ., 634 F.2d at 908 (citing Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975)).

[111]634 F.2d 900.

[112]*Id.* at 904. The court noted that every Supreme Court case which has waived the exhaustion of administrative remedies requirement in section 1983 suits has done so only where the available administrative remedy was inadequate. *Id.* at 906.

[113]*Id.* at 912.

[114]*Id.* at 912-13.

[115]*Id.* at 913.

[116]*Id.* at 910.

[117]*Id.* at 911.

[118]*Id.*

[119]*Id.*

Administrative remedies are also "simpler, speedier and less expensive for the parties themselves."[120] Finally, the court suggested that exhaustion of adequate administrative remedies is "supported by fundamental notions of federalism and comity"[121] because "the citizens of a state have a constitutionally based interest in autonomously running the state business and government to the fullest extent possible, until it collides with the federal constitution."[122] Moreover, the court observed that "[g]ood faith efforts by the states to provide protection for . . . parties are discouraged when federal courts encourage ignoring state administrative remedies."[123]

Significantly, the plaintiff in *Patsy* brought her section 1983 action pursuant to section 1343.[124] The plaintiff alleged deprivation, under color of state law, of her federal constitutional rights.[125] Where, on the other hand, a plaintiff has a non-equal rights statute-based section 1983 claim which falls within the jurisdictional grant of section 1331, the policy considerations articulated by the court of appeals in *Patsy* are even more relevant.

B. Non-Equal Rights Statute-Based Section 1983 Claims and the Policy Behind the Exhaustion Requirement

Once a district court has satisfied itself that the five objective criteria for measuring the adequacy of state administrative remedies are met, very few non-equal rights statutory section 1983 claims should survive the second step of the *Patsy* analytical rule. In balancing the interests of the plaintiff and the usefulness of the exhaustion doctrine, certain of the policy considerations set forth by the court of appeals in *Patsy* virtually compel exhaustion of adequate administrative remedies when no constitutional injury is alleged. First, exhaustion would free the federal courts to devote more time to the protection of constitutional rights. Admittedly, it would take time for any noticeable easing of the federal caseload to manifest itself. Plaintiffs might initially couch their claims in terms of the alleged inadequacy of available administrative remedies. Once a particular state system has been found adequate by a federal court, however, the precedential effect of that decision should bar similar future claims. Even more importantly, an exhaustion of administrative remedies requirement would recognize the interests of the citizens of a state in running state government. The court of appeals, in *Patsy*, intimated that recourse should be had to federal

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[120] *Id.*
[121] *Id.* at 912.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 902.
[125] *Id.*

court only when the administration of state government clashes with the federal Constitution.[126] By definition, the non-equal rights statutory section 1983 action does not allege state action which collides with constitutional provisions. Therefore, "notions of federalism and comity"[127] lend particularly strong support to exhaustion of adequate state administrative remedies in these statutory suits.

Widespread adoption of the exhaustion doctrine of *Patsy* would in short ease the workload of federal district courts while upholding comity between states and the federal judiciary, two goals long sought both by courts and Congress.

VI. CONCLUSION

The Supreme Court has held that section 1983 provides a remedy for claimants asserting deprivation by states of rights created by federal statutes which do not provide for equal rights. Section 1343, the usual jurisdictional counterpart to section 1983, was held, however, to not be available to such claimants. In so deciding, the Supreme Court clearly indicated that most such claims, at least those with an amount in controversy of less than $10,000, should not be litigated in the heavily burdened federal court system. Plaintiffs soon recognized, however, that their statute-based claims would still be cognizable in federal courts if pleaded pendent to "not wholly unsubstantial" constitutional claims. Following the Supreme Court's lead, the lower federal courts seemed ready to preclude such pendent actions when Congress amended section 1331, eliminating the jurisdictional amount requirement for general federal question jurisdiction and opening wide the federal courthouse door to an expanding class of cases. Given the reluctance of the federal judiciary to hear these non-equal rights statute-based section 1983 claims under the former statutory scheme, it is likely that the federal courts will again fashion some jurisdictional roadblock in order to keep their caseloads at manageable levels. That end may be accomplished by requiring plaintiffs to exhaust adequate administrative remedies before bringing their section 1983 statute-based complaints in federal court. The circuits are evenly divided on this requirement now and it is only a matter of time before the issue is put squarely before the Supreme Court. An exhaustion requirement pronounced by the Supreme Court would be the final step on a long and tortuous path to limited jurisdiction over non-equal rights statute-based section 1983 claims.

MICHAEL J. GRISHAM

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[126] *Id.* at 912.
[127] *Id.*

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

(Required by 39 U.S.C. 3685)

1. TITLE OF PUBLICATION	A. PUBLICATION NO.	2. DATE OF FILING
INDIANA LAW REVIEW	9 6 6 7 0 0	9/26/81
3. FREQUENCY OF ISSUE	**A. NO. OF ISSUES PUBLISHED ANNUALLY**	**B. ANNUAL SUBSCRIPTION PRICE**
Monthly in - Jan., Mar., Apr., June	4	$15.00

4. COMPLETE MAILING ADDRESS OF KNOWN OFFICE OF PUBLICATION *(Street, City, County, State and ZIP Code) (Not printers)*

735 West New York Street, Indianapolis, Marion, Indiana 46202

5. COMPLETE MAILING ADDRESS OF THE HEADQUARTERS OR GENERAL BUSINESS OFFICES OF THE PUBLISHERS *(Not printers)*

735 West New York Street, Indianapolis, Marion, Indiana 46202

6. FULL NAMES AND COMPLETE MAILING ADDRESS OF PUBLISHER, EDITOR, AND MANAGING EDITOR *(This item MUST NOT be blank)*

PUBLISHER *(Name and Complete Mailing Address)*

Indiana University School of Law-Indianapolis, 735 West New York St., Indpls., Marion, IN 46202

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